POINTS OF VIEW

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BY

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X

COURTS-MARTIAL

THE unexpected nature and extent of the administrative problems which faced army chiefs as the late War unfolded its course have been a constant subject of discussion and illustration in the hands of both military and civil narrators of war experiences. The creation of services and departments hardly dreamt of before the War by even the most imaginative of staff officers had, at its close, produced much amazing improvisation, absorbed much man-power, and added greatly to the congeries of employments which so long defied the efforts of the demobilisation branch of the War Office. But at the outset the necessary services were slow to realise a tenth part of the changes which modern warfare demanded. The military mind notoriously runs in grooves, and, whatever the vigour and initiative displayed in progress along an established track, the first start in a fresh direction is too often a slow and uneasy effort. Army reform is indeed as difficult as law reform, and the conservatism of lawyers is matched by that of soldiers.

It will not, I think, be without interest to trace the progress and effect of what was at once both a military and a legal reform, the development,

x. namely, of a special military service which, though small by comparison with others, provided at the end of the War sufficient contrast with its modest beginning.

The original Expeditionary Force of six Divisions took with it, attached to Sir John French's Headquarters Staff, a single adviser in military law; officially he was the Deputy of the Judge-Advocate-General who remained at home, and his prospective existence had been recognised in a single paragraph in *Field Service Regulations*. The "D.J.A.G."[1] in due course established himself as a well-recognised official, helpful, diligent, unprejudiced, and experienced in both civil and military law.

The system of law he was called upon to administer needs an explanation which must in some degree be technical. A soldier upon enlistment provides the clearest modern instance in English law of a distinct legal status such as Roman law defined with so much care. He is not the only instance, for he shares the distinction with infants, lunatics, and trade unions. Without losing in all respects his status as a civilian, he acquires a new status which it is the main function of military law to define and regulate. It is with the internal rather than with the external aspect of this status that military law deals. The relation of the soldier to the civilian remains, for the most part, regulated by ordinary law.

Yet military law is, in its origin and authority and from a technical standpoint, ordinary law. Apart from some few surviving elements of the

[1] Brigadier-General Mellor, K.C.

Royal prerogative it is all based on statute. It is in the Army Act that the soldier (if he ever look) finds his duties and his rights; and that Act is, of course, as good law as any other Act of Parliament. But the status it establishes is a thing apart. Once enlisted the soldier has by law—Act of Parliament, that is—to be where he is wanted. Absence from that place (unlike the absence of the office boy whom the attractions of a Wednesday football match have drawn away from the call of his employer's bell) may entail, upon conviction by court-martial, a punishment of two years' imprisonment with hard labour. The soldier must obey orders of superiors; the result of failure again may differ widely from that of the civil breach of the contract of service which a workman commits when he disobeys his foreman's orders; if committed "in such a manner as to show wilful defiance of authority" when on active service, it may indeed entail a sentence of death. The mere display of a lack of moral quality—courage—may in similar circumstances have a similar result. Such results are not imposed upon soldiers by the arbitrary will of their commanders (as is sometimes ignorantly supposed), but by the positive enactment of an Act of Parliament. x.

Rights as well as duties are dealt with and defined by the same statute. The soldier's pay is a statutory right, and cannot be withheld at the caprice of his commander. His status itself is in many ways safeguarded. A soldier once appointed a non-commissioned officer cannot arbitrarily be reduced. A conviction for an

x. offence by court-martial, or a special reference to the War Office or other high military authority, is necessary. His right of expressing his grievance, while limited, is rigidly safeguarded by law; collective action he may not take, but he has a statutory right to make complaint to his commander. That commander must in his turn forward the complaint to still higher authority if required to do so.

It is as a "person subject to military law" that this status belongs to soldier and officer alike. The phrase is the governing one throughout the Army Act, and indicates that a special class with a special status is the main subject-matter of the Act, and that the Act affects, generally speaking, no one but that class. The status belongs to the soldier wherever he goes, whether at home, or abroad, or in captivity.

It is necessary in an explanation designed chiefly for those who are not lawyers that I should here mention (if only to distinguish it) that "martial law" which means so much more a state of facts than a state of law, and which has no relation to the Army Act nor, apart from special cases, any statutory basis. To the English lawyer it indicates ordinarily the rights and powers of the Government, normally exercised through its military subordinates, to maintain order and security and its own authority. Such an assertion becomes necessary in the face of a hostile foreign army or population, or of insurrectionary movements at home, causing the disruption of the civil order, and failure of the ordinary civil institutions to suppress them.

The clearest case of martial law occurs when the territory of an enemy state is occupied by the military forces of the Crown. Martial law arises here automatically with the laws of war, a branch of international law which is recognised and adopted as the municipal law of this country. Here, as the Duke of Wellington said in the oft-quoted phrase, martial law is simply the will of the Commander-in-Chief, bound only by the laws of war. The authority of the enemy state itself is in suspense; and the authority of the invading army is substituted. Upon the Western front no such situation arose until Lord Plumer with the Second British Army advanced into German Territory at the end of 1918. Of the legal system which he then enforced upon the occupied area I shall have a word to say later. It did not affect his own Army, which carried its own status with it. X.

The system of trial by courts-martial is an integral part of the system of military law which I am discussing.

No court-martial held to deal with the offence of a person subject to military law is the arbitrary creation of a military commander, exercising its powers merely as his delegate. It is a statutory tribunal bound by rules laid down in the Army Act, or in regulations made by the authority of the Act, and its powers are enforced upon it by the Act. By virtue of the Act its sentences are enforceable. The law of evidence prevailing in civil courts is expressly applied by the Act to the proceedings of a court-martial.

By military custom and arrangement military

x. discipline comes under the jurisdiction of the Adjutant-General. It is obvious that in any war the control and supervision of the whole system of trial by court-martial must form a highly important and technical part of the duties of his branch, and that in the late War the tremendous growth in the size of the Expeditionary Force must have enormously increased the volume of work of that branch of the Staff. One special feature of a court-martial is that its decision against an accused person is not valid until it is confirmed by superior authority, and that its convictions may be quashed, or its sentences mitigated, upon review by still higher authority. This process of review must necessarily prove a serious item in the work of the commander of any large formation and of his staff. I speak primarily of the situation on the Western front, where for a period I had personal experience of staff duties; but my remarks have, I know, a general application to the smaller theatres of war. Laborious and responsible duties were at the same time cast upon regimental officers. The training which a regular officer received in court-martial duties before the War and his experience in military discipline and military human nature probably made a peace-time court-martial, which for the most part dealt with purely military offences, a good average instrument for administering military justice. But during the War trials increased in number, while the officers of seniority and experience available as members of courts decreased. Those that remained could ill be spared from the urgent

work of commanding, training, and refitting their troops. x.

It might have been expected that an early effort would have been made to create a staff of officers with legal training to assist in working this important and growing side of the daily work of the Expeditionary Force. The start, however, as in so many things, was somewhat late. Of the early stages of the matter I had myself some small personal experience. I had been serving in France with the Indian Corps since November 1914 on Sir James Willcocks' Staff. My own duties were remote from those of the Adjutant-General's branch; and the troops with which I came into personal contact were mostly Indian. But I saw and heard enough of the feelings and difficulties of regimental and subordinate staff officers to see the need for a change, and I pressed it, though quite unsuccessfully, when opportunity arose, on the Staff. No profession contributed from civil life a larger proportion of recruits to the commissioned ranks of the armies in the field than the Bar, and it appeared to me plain that a due supply of officers with legal experience would be available if a proper organisation were set up.

Early in 1916 I returned to England on my appointment as Solicitor-General in Mr. Asquith's second Government, and found in more exalted quarters the same difficulty that was harassing officers in the field. Lord Kitchener sent for me and asked me to undertake for him the review of such court-martial proceedings as came before him on appeal to the highest authority. For

x. every one that the Secretary of State in pre-War days had to read in a month, he was, he stated, now confronted with at least eighty, and it was in consequence quite impossible for him to give any real attention to them. I acted for him in this capacity until his death, and for subsequent Secretaries of State until my appointment as Lord Chancellor, reviewing in all many thousands of cases. Finding a soldier of his experience and eminence thus open-minded in accepting expert civilian help, I seized the opportunity to press most urgently upon him my views as to the need of the Army in France of similar help. He welcomed the idea, and after that the obstacles to the scheme diminished.

It grew, indeed, fairly rapidly, and in so doing presented two aspects.

On the one hand, it was needful to provide more personnel for the control and supervision of the judicial system as a whole. For this purpose a second-grade staff post was created for each Army Headquarters, and was reserved for officers who were qualified lawyers, and who had received special instruction in military law. For these officers direct personal access to their Army Commanders was secured as a matter of daily routine. Decentralisation was likewise effected thereby, and the presence of a legal expert nearer to the troops in action than the Deputy-Judge-Advocate-General at G.H.Q. ensured greater promptitude in advice and review. Growth of duties later rendered necessary the addition of a staff captain, similarly qualified, at each Army Headquarters. Base headquarters were

afterwards staffed on the same lines. The Deputy-Judge-Advocate-General (under whose friendly and intelligent guidance the whole scheme grew) remained the final resort in case of difficulty. X.

When this scheme was first instituted, a second-grade staff post in the lofty atmosphere of Army Headquarters was still an object coveted by comparatively senior professional soldiers, though later, as the whole organisation swelled, civilians in such positions became extremely common. But the importation of non-professionals for legal duties at a comparative early point in the War did not by all accounts beget the jealousy or friction which might have been expected. The practical advantages which occurred were too obvious; and many a hard-pressed staff colonel did not trouble to conceal his satisfaction at being relieved of the mass of technical and other detail which would have been entailed by the daily presence of a batch of court-martial proceedings with a view to satisfying the possible searching curiosity of his Army Commander.

The other aspect of the scheme more nearly touched the common earth of army life. The Field General Court-martial was strengthened by the addition of an expert member. In the peace-time system the need for the expert was somewhat vaguely recognised by the presence of a judge-advocate who acted as clerk of the court, and who might be a lawyer of experience, but who might also be merely an officer with a better knowledge of the formal requisites of a trial than his fellows. The regulations for the active service

X. court-martial do not provide for such an adviser, and he could only be introduced by being appointed a member of the court. The expedient was a simple one seeing that courts-martial were not permanent courts; and all that was needed was the addition of the requisite name in the convening order. It was assuredly an advantage that the expert thereby became an actual member of the court, bound by its oath, and responsible equally with his fellow-members for its decision.

The scheme was launched tentatively and with an apprehension that in the light of events seems comic, but which the constant narrowness of the army view rendered natural. The instinct of the regimental officer to resent the interference of interlopers from without, and especially from above, unless clearly clothed with the authority of senior rank and established position; the doubts of the senior (and presiding) officer lest his dignity should suffer by the appearance of taking advice; the possible resentment of the accused, usually a private soldier, at being tried by some one who is not one of "our crowd"; and the suspicion which foolish laymen appear to entertain of all lawyers, were all weighed anxiously in the balance. Experience showed that, with ordinary tact upon the part of the expert, the fears were groundless, and in the later development of the system even tact was hardly indispensable, so welcome and so essential did the presence of the expert become. By the latter period almost all the surviving professional soldiers with court-martial experience had attained positions which relieved them of court-martial duties, and

their successors were civilians who had learnt their soldiering in the school of recent experience, varied by periods of instruction, both of which had accustomed them to the intrusion of the specialist expert, and in neither of which had the study of military law been prominent. Such officers when confronted with a day of court-martial duty turned eagerly to the court-martial officer on his arrival and gladly left the practical direction of the proceedings to him, reserving to themselves the watching and weighing of the human drama before them, and providing in themselves the military experience and local knowledge which must always remain the chief element in the military system of justice. So great was the success of the system that it was rapidly extended, and ultimately a sufficient number of court-martial officers was appointed to secure that ordinarily every trial would have an expert member on the court. X.

The duties of these officers were of several kinds:

First, they kept the court straight as regards formal technicalities. What is easy routine to a man who does a thing every day is a bewildering maze to those who do it at intervals, as so many of us realise when we are called upon to make up our Income Tax returns. To many regimental officers the duty of presiding over a court-martial at intervals of several months must have resembled an actor's experience at an unrehearsed "first night." To the court-martial officer it was merely as one night in a long run.

Next, the court-martial officer took the record

x. of evidence. The subsequent process of confirmation and review, so vital a feature of the system of military justice, necessitates a proper note of the proceedings. There is nothing in which the uninstructed layman may fail so grievously as in this process. I read many thousands of such records; and in the earlier days of the War I was struck with the inequality of the work. The difficulty in which the reviewing authority is placed by a bad record is obvious. The somewhat perverse failure of inexpert tribunals to record essential facts because they do not become prominent as matter of controversy was particularly distressing.

An illustration (imaginary but sufficient) will show what I mean. Private Smith having been shot dead by the gross negligence of Private Jones while cleaning his rifle in rest billets, a court-martial is rightly ordered on a charge of manslaughter. The court (entirely composed of non-legal officers) investigates the case with scrupulous care and notes down all the details of the actual occurrence where controversy might arise, and discloses evidence which leaves no doubt of Private Jones' negligence or of the fact that Private Smith was shot as a result of it. But the story of the occurrence as recorded in the evidence of the witnesses who saw it omits any evidence that Private Smith died as the result of his wound.

Yet lack of evidence of death leaves a charge of manslaughter a little ill-proved; and the lawyer who reviews the proceedings begins to wonder how the Brigadier allowed himself to

confirm them. But stay, the last witness is the company-sergeant-major, who arrives when everything is over, and only wants to say that he put the prisoner under arrest and sent him to the guardroom. This irrelevance the court records with due solemnity, and likewise an addition which the witness makes to complete the account of his own proceedings, "And after that I told the men in the hut to remove the body." Here, therefore, quite by accident, we get it recorded, and by reading the evidence all together it may just sufficiently be inferred (only just) that the body was that of Private Smith, that it was a dead body, and that the rifle-shot was the cause of the death. Very probably the earlier witnesses had said that they saw Private Smith dead, after he was shot, but as everybody knew it, and no one disputed it, the court had not troubled to record it in the right place, as an integral part of the case to be proved. The evidence of the medical officer was probably too much for which to hope. X.

The presence of a lawyer, accustomed to consider, when advising on evidence, what are the essential elements of a crime, ensures that the essential evidence will not be omitted from the record, and that, if it were omitted, it is because the evidence was not available.

Another obvious duty of the court-martial officer was to advise the court on the admissibility of evidence. The civil law of evidence, as I have said, governed the proceedings, and laymen could not be expected to apply it without guidance. In the simple cases it was indeed surprising to find how little harm was done even when such

x. assistance was lacking. But here, too, much waste of time was often involved in earlier days. The illustration I gave above suggests a human trait, which often marked military witnesses—a tendency to wander from the relevant facts into a description of their own doings, which generally included a detailed account of the superiors whom they went to find, and the reports which they made to them. These doings recorded with sympathetic interest by a non-legal President as proof of conduct in accordance with regulations, though having no bearing on the issue in the case, prolonged proceedings and assisted to obscure vital facts. Moreover, the introduction of so much hearsay evidence in this way afforded a risk of prejudice to justice.

In the actual situation the presence of a legal expert afforded the chief security that trial by court-martial resulted in justice. It was the duty of the court-martial officer to see that the court made a proper investigation of the case; and that the evidence given was thoroughly weighed when the court was closed for considering the findings. The danger of an inexpert tribunal always is that the enquiry will not be pushed home as it should be, or that the probing of the facts will be misdirected. The lack of both expert prosecutor and expert defender made the danger in the case of a court-martial on active service far greater. That the court would itself direct the investigation appears to have been assumed as a matter of military tradition, and in the absence of skilled advocates on either side was no doubt often necessary. The presence of

the court-martial officer helped to ensure that the investigation would be complete, and that all the facts favourable to either side would be elicited.

The duty of a court-martial to protect the interest of the accused is clearly established by military custom and tradition, but the presence of the court-martial officer, working on the lines mentioned, was an additional security that this duty would be thoroughly fulfilled. Much discussion arose after the War as to whether Army Regulations should be amended so as to provide for expert advocacy in aid of the defence at a trial by court-martial. I myself doubt very much whether on active service such a system would be possible as a general rule; and I think the need for it has been much exaggerated.

The mere fact that the prosecution as a rule had no expert advocate suggests that the system itself did not involve unfairness between the two sides. The forensic efforts of the youthful adjutant who "took his place as prosecutor" hardly ever went beyond the summoning-in of the witnesses for the prosecution from outside, and the proffer of the prisoner's conduct sheet at the end.

As the adviser of a reviewing authority, who had to wade through many pages of ill-written matter, I never ceased to resent the respectful regard for rank which generally led the prosecutor to summon his witnesses in order of seniority, without any regard to the chronology of the events to be given in evidence. No doubt the presence on both sides of experienced advocates

X. would in some cases have made things easier for the courts and avoided the risk of error.

But many cases were of a simple description, and on the lines of a police court case, such as are generally dealt with at home without expert advocacy on either side. In more difficult or complicated cases the need for such assistance became apparent. But here, again, a fairly satisfactory attempt was, I think, made to meet the need. In such cases the court-martial officer could sometimes be spared to prosecute or defend, while still more often an officer with a legal training, who was doing duty with his unit, could be obtained to act as prisoner's friend.

The main safeguard in all such cases, however, really lay in the nature of the officers composing the court, and the strength of their desire for justice. The English character, often lacking imagination, is strong in its sense of justice. The officer class during the War was typically English, and the conviction of an innocent man would have been abhorrent to all. Moreover, the justice administered was, for the most part, to the men with whom they themselves fought, whose dangers and sufferings they shared, and with whom they had the indefinable community of spirit that permeates a fighting service. The facts that the subject-matter of their enquiries was itself so much part of their own existence, that they were not investigating the concerns of people whose circumstances and manner of living were wholly different from their own, that in effect they were like a professional body investigating a breach of professional etiquette alleged against its own

members, provided a safeguard against the mischief that must normally result from the exercise of judicial powers by persons untrained by forensic experience. A Field General Court-martial, composed of officers inspired and experienced as I have described and strengthened by a legally trained mind, in the main gave good and effective justice. X.

So far as my experience goes, the main risk of injustice to an accused person arises in those cases where an officer, over-anxious about the discipline and efficiency of his force, and desirous, it may be, of averting criticism from himself, may seek to prove a case, and secure a conviction, for motives ulterior to those of justice. I touch upon a notorious evil of army life which operates more widely in the sphere of promotions and appointments perhaps than in the judicial system. An ambitious senior may seek to cover his own mistakes at the expense of his subordinates. Great activity in dismissals and replacements after a failure may serve to divert the criticisms of his superiors from the defects of his own scheme of operations, and create an impression of vigour and resource that will ensure success at the next attempt. The danger exists in all ranks, and one may expect to find it in the last-made lance-corporal as well as in the most senior officers. The fact that it is rare must not blind us to its existence; and I for my part scrutinised proceedings with the utmost care, if the situation suggested that a charge had in any way a basis in a desire to shift responsibility, or turn the flank of an expected attack upon the officer making the charge.

X. Here again I do not doubt that court-martial officers formed a safeguard. Trained in a system where judicial independence is a remorseless tradition, they were bound to strengthen a court against dictation from outside; while the arrangement by which they were attached to headquarters of the highest formations gave them an independence of the convening officer which the other officers of the court (who were normally under the latter's command) did not enjoy.

But the cases in which such positive dangers to the cause of justice arose were, I am convinced, extremely rare. The main function of the lawyer-soldiers was, as I have described, that of giving expert guidance to officers only too anxious to deal out even-handed justice.

In many cases I am indeed inclined to think that the most frequent instances of incompetence revealed by the court-martial system which prevailed during the War were of the opposite character, and that undue leniency prevailed as a result of the lack of judicial experience. My general impression is that a General Court-martial held at home often proved itself a tribunal too indulgent to an accused person; and to speak frankly, could easily be bamboozled by an experienced advocate, or adroit prisoner, to take a perverse view of plain facts, with the result that justice was not done, and persons whose guilt was proved escaped conviction. Very many of the offences dealt with at home during the War were in the nature of civil offences, frauds in connection with accounts and stores, and the passing of worthless cheques, in which the court's

own instinct and experience in matters of purely military discipline were of little or no assistance. In some of these cases defences, which would have earned the stolid incredulity of a jury, under the guidance of a judge of assize, or at quarter-sessions, were received by a court-martial (mostly composed indeed of "dug-outs" and territorial officers beyond the age of service in the field) with a polite and credulous acquiescence which to the eye of experience was almost pathetic.

This feature of the system may justify humorous reflection upon the attitude of some very senior officers when the introduction of lawyers into the court-martial system was first mooted. They could foresee nothing but technical obstacles to the progress of cases and a crop of "legal quibbles," instead of what they regarded as their own plain common-sense straightforward way of dealing with military offences. They apprehended uneasily that crimes would go unpunished and military discipline would suffer. A plain common-sense view of offences by courts-martial insufficiently guided by lawyers was, in the sort of case which I have mentioned, the one thing that was lacking. Lawyers after all are just as much interested in the punishment of crime as soldiers, and as a rule, in any complicated case, have much more experience in the detection and proof of it. As I have said, the introduction of lawyers into the court-martial system did not in fact produce results detrimental to discipline, and must in many cases have greatly helped a court through its difficulties, when entangled in technical traps laid for it by some offender more wary than his

x. fellows. The fact that special care was taken, wherever possible, to secure that in all theatres of war the officers appointed to special court-martial duties had themselves seen active service, and performed regimental duties, ensured that the legal element would not lack sympathy with either the circumstances of the fighting troops or the paramount consideration of discipline.

Sentimental critics, who regard a court-martial as an instrument of tyranny, and to whom a military offender is normally an oppressed victim, fail to comprehend both the practical possibilities of the situation, and the nature of the main object which the court-martial system exists to secure. Even a slight experience of military routine will sufficiently establish the practical difficulties of providing any but a domestic tribunal to deal with the military offences of an army, whose units are constantly on the move to all parts of the world. The actual nature of the object to be secured makes a domestic tribunal nearly inevitable. Discipline, it is hardly necessary to insist after seven years of warfare, is the basic quality of an army capable of action in the field. As the primary object of criminal law is the protection of the civil community, so the prevention of indiscipline, the greatest danger which threatens the military community, and one which must involve it in complete destruction if admitted, is the primary object of the court-martial system. The civil community, as we have known it in the past, from the greatness of its size and the fact that it is a natural growth, is stronger than the military community, which is an artificial struc-

ture created for a special purpose, and relatively small in size. The strain to which the military community is exposed is moreover infinitely the greater. The civil community can thus normally afford to take greater risks with itself. Hence it is that in this country we are accustomed to a police system, which is often humorous in outlook and indulgent in practice, and to a judicial system which in its turn allows scope to such tendencies without injury to the community. So many civil offences can be ignored or forgiven and national discipline nevertheless sufficiently be maintained. The fact that a pilferer from a tradesman's shop in a small town is bound over, or escapes conviction, need not have the effect of encouraging petty larceny. Even when some well-established legal criminal, grown wily with experience, succeeds in deluding a jury and defeating the police witnesses, the result may merely be to turn a rascal adrift again for a while. The incident (unless frequently recurring) is not too likely to encourage other criminals in their evil courses, or to turn to crime those who are still respectable. The intrusion of a sporting instinct in a civil trial is often inevitable and unobjectionable, and the specious appeal of an advocate to the sentiment of the jury may in a given case take advantage of this and similar instincts, so that fellow-feeling, or even pity, may operate to defeat strict justice. The civil community does not usually suffer from such indulgences.

Military discipline, especially upon active service, requires a harder and more callous protection. To ignore a particular offence in a given case

X. may ruin the morale or efficiency of a battalion. Merely to reprimand, for instance, a soldier for sleeping on his sentry post, when sentry duty is a nightly experience for dozens of men in his unit, and the temptation to sleep is ever present, does not protect discipline. The duty of alertness in such a case is reduced to the level of one of those minor civil obligations, such as the getting of a gun licence, or the lighting of a bicycle lamp at sun-down. When men are going on leave from the front every day, the man who takes an extra month in England cannot be treated merely as an object of sympathy when he recounts (as in so many cases I have read) the illnesses of his relatives and the important private business which as he thought justified or palliated his crime. In all such cases example is contagious. The life of a battalion is in this respect so much closer and more intimate than that of a civil community. Indeed, as has often been said, where the risk of doing one's duty is so great, it is inevitable that discipline should seek to attach equal risks to the failure to do it.

It is, therefore, natural that in many cases court-martial sentences should be severe. The court alone has power to award sentences. Upon confirmation and review they can be mitigated but not increased. It is essential therefore that the court should not give the seal of its approval to a low standard of discipline by the lenity of its judgment or of its sentence. When once the strict judgment is pronounced, lenience may often be shown from higher authority, after a full view of the requirements of discipline in the unit con-

cerned. The responsibility of an officer in high command in such cases is serious and often difficult. The court and the local commander who confirms the proceedings are the primary judges of the needs of discipline. The reviewing authority can, if he chooses, by indiscriminate mitigation easily satisfy his humane instincts and sentiments of pity, and achieve a glow of self-satisfaction from the process. But his duty lies not to himself and to his feelings, but to the force which he commands. Lenience to an individual may be cruelty to the force. I may be permitted to cite once again the Duke of Wellington's explanation of a commander's duties: X.

"I consider all punishments to be for the sake of example, and the punishment of military men in particular is expedient only in cases where the prevalence of any crime, or the evils resulting from it, are likely to be injurious to the public interests. . . . It is very unpleasant to me to be obliged to resist the inclination of the General Court-martial to save the life of this soldier; but I would wish the Court to observe that if the impunity with which this offence, clearly proved, shall have been committed, should, as is possible, occasion resistance to authority in other instances, the supposed mercy will turn out to be extreme cruelty, and will occasion the loss of some valuable men to the service."

A minor illustration of these principles is afforded by the existence during the War of another department of the court-martial system under the Defence of the Realm Acts. By these Acts the whole nation was put under discipline,

x. and in some cases it was considered desirable by Parliament that the tribunals to enforce war regulations should be military. I do not propose to include the operations of this system in my review. But it illustrates the principle that, when the civil community is in danger, civil discipline must be strict, and that exceptional judicial measures must be taken to safeguard it.

That very peculiar legal system, which under the ill-defined term " martial law " may embrace territories, and all persons in them, and may establish a jurisdiction for the whole of a civil population, has already been distinguished from the statutory " military law " of our own military forces, and it deserves here some further brief mention. Landing, as did our original Expeditionary Force, in friendly and allied territory, and fighting there for four years, it was not concerned with the legal control of the civil population ; the authority and jurisdiction of the French and Belgian Governments over their subjects remained intact, and were exercised through the civil police and the numerous French and Belgian Liaison Officers attached to our various headquarters, in close touch with whom our own Provost-Marshal and his numerous subordinates worked. But in enemy territories, and those where the normal civil authority had in fact lapsed on the outbreak of hostilities, a British Commander-in-Chief became by virtue of the laws of war at once sovereign for all purposes connected with the maintenance and safety of his troops, and the conduct of operations, and with the adequate control and protection of the

civil population. Courts must be established, and regulations made having the force of law, by which this control can be made good. In Palestine and Mesopotamia such a system became necessary at the outset of the respective campaigns. Upon the Western front the need arose only towards the end of the War, when the Rhine provinces and the bridgeheads beyond the Rhine were occupied under the Armistice. x.

Some practical pages in the official *Manual of Military Law* formed the officer's guide to his powers and jurisdiction as representing the temporary military sovereign of the occupied area. Writers on international law have discussed the subject at length, and some aspects of it are legally controversial. But no occasion for controversy arose in the practice of the Army of Occupation during the period of the Armistice.

Proclamations were published under the authority of Marshal Foch for the whole area, and of Sir Douglas Haig for the area occupied by British forces, warning the inhabitants against molesting troops or having arms, and establishing rules for the control of railways and other means of communication, for the observance of curfew hours and for the numerous other matters requiring regulation where there is military occupation of a hostile country.

For the purpose of setting up and working the necessary courts a call was made upon the available lawyers in the army. The near approach of demobilisation did not facilitate matters, but a supply was secured, and a system of courts established combining both civil and military

X. principles. For the important centres of population, officers with a legal training sat by themselves as military magistrates to try the less important cases. In the outlying districts selected senior commanding officers dispensed justice in similar cases rather on the lines of the procedure adopted in their own orderly room for dealing with their own military offenders.

More serious offences were reserved for trial by "military courts" which imitated the procedure of Field General Court-martial. A day in the summary courts of Cologne or Bonn produced a series of cases in their number and character not very dissimilar from those with which a busy stipendiary magistrate deals at home,—breaches of curfew regulation, travelling without passes, minor cases of insulting behaviour to British troops or disobedience of military orders, pilfering of military stores, and smuggling.

Pilfering of military stores appears at the outset to have been a serious nuisance. The occupied area, after years of our blockade and the insistent demands of war, was nearly destitute of certain commodities. The petrol and motor car tyres, which the Army Transport brought with it in profusion, required without always receiving the most careful guarding, and "Being in unlawful possession of British military stores" was a frequent charge against German inhabitants. One may perhaps surmise that the treatment of such offenders was less drastic, and possibly less effective, than the measures taken by the German army to protect its stores during the occupation of Belgium.

A special department of the army staff was set up under an officer who was styled a Military Governor to administer martial law in the occupied area. Much purely civil administration had also to be done in the difficult economic circumstances of the country. I visited the area myself on a fleeting occasion, and found everywhere confirmation of the reports received from many visitors, that the occupation was a most moderate and gentlemanly affair, and that the Germans, notwithstanding the blow to their pride, and some discomfort in providing the requisite billetting accommodation, had every reason to congratulate themselves on the results. The mere security against the revolutionary disturbances that took place on the other side of the Rhine was, I think, secretly admitted to be worth having. X.

The whole of the ordinary civil administration was allowed and indeed required to continue. The local civil officials had remained at their posts in accordance with the terms of the Armistice and the orders to them were "carry on." With disputes between Germans the Army of Occupation did not concern itself, and German courts continued to exercise jurisdiction under the authority of the Army Commander. But for the needs of the army and the limitations imposed by the separation of the occupied area from the rest of Germany the civil government was not changed. The greatest interference was probably in communications, the movement of troops and military supplies necessitating rigid control of railways.

I have, I hope, said enough to make it plain

x. that in my view the improvisation of an adequate and, in the main, a merciful justiciary system, was not the least remarkable improvisation of the War. And perhaps I may be bold enough to justify my intrusion into this strictly military field by quoting from a letter which the Army Council addressed to me on August 7, 1919 :

" I am commanded by the Army Council to place on record their cordial thanks for the service you have rendered to the legal work of the army, especially in the revision of military courts-martial, a duty which, in addition to your other heavy work, you have undertaken for a period of four and a half years on behalf of five successive Secretaries of State for War. . . . While maintaining the main principles of military law and standardising the decisions of the military tribunals, your influence was always exercised on the side of humanity."

It has seldom fallen to my lot to receive thanks which I valued as I value these.

XI

LAW REFORM

THE task of any Lord Chancellor in planning or carrying through schemes for legal reform is one of exceptional difficulty. Not only is he a Minister of the Crown and a member of the Cabinet, whom he must convince of the necessity as well as of the expediency of the measures which he proposes, but he must—if his reforms are to obtain acceptance in the profession of the law—act with the concurrence of great judicial personages and with the general assent of the instructed minds of the professions.

On the first point, legal reform has, I am glad to say, passed out of the domain of party politics. Proposals for the amelioration of the law receive from the Bench, the Bar, the solicitors' profession, and both branches of the Legislature, consideration upon their merits and without any regard to political consequences. And they have this further inestimable advantage, that each Lord Chancellor can take up the work where his predecessors left it and receive from them—as I have received—most cordial support and most sagacious counsel. Since the days of Lord Selborne and Lord Cairns, legal reforms have been dealt

XI. with in continuous fashion; and, though every Lord Chancellor must regretfully acknowledge to himself that the span of human life, and the still shorter span of life of the Administration of which he is a member, must deny him the satisfaction of bringing to fruition many of the projects with which he enters office, he knows that as he has tilled and watered the ground which has been prepared and sown by his predecessors, so those who come after him will continue the work upon which he has been engaged.

On the other hand, the mere fact that political interests and feelings are no longer involved in projects of law reform deprives the reformer of that momentum which is necessary to place measures upon the Statute-book in these days of crowded Parliamentary time. The matters dealt with are of first importance, and touch very nearly the life and work of all classes of the population; but they are in their nature technical and difficult to understand and cannot command the enthusiasm which was generated by the efforts of the reformers of the earlier nineteenth century.

Fortunately, the work of those reformers has now taken definite shape, and it is improbable that, in any time which can be foreseen, it will be desirable to touch the main framework of the Judicature Acts of 1873 and 1875, however much changing habits and greater experience may lead us to desire any modification of details and a completion of some of the parts of that great edifice erected by Lord Selborne and Lord Cairns which remained unfinished when the zeal for law reform spent itself some time in the 'seventies.

Transfer of Land

XI.

There is in particular one great field of substantive law (as distinguished from the law of machinery and procedure to which the attention of Lord Chancellors must mainly be directed) calling, in my opinion, for an early and a comprehensive settlement. In spite of the beneficent series of statutes dealing with the law of conveyancing and settled land, which introduced so many advantages into the system of the transfer of land, and abolished so many absurdities, the fact remains that the system which they sought to improve is in its nature cumbrous and antiquated, and requires drastic treatment to bring it into conformity with the business needs of the community. Concurrently with the attempts to improve the law relating to the transfer of land, there have proceeded a series of statutes, culminating in the Land Transfer Act, 1897, which have for their aim the introduction into this country of a system, such as prevails in most of the civilised countries of the world, of transfer by registration. In my view, it is in the universal application of this principle throughout the country that there lies the true solution of the difficulties and obscurities which puzzle and annoy laymen and offend the more enlightened professional gentlemen whose daily lives are concerned with the transfer of land.

The experience gained since the Act of 1897 came into operation proves, in my opinion, that the universal establishment of such a system is both possible and expedient. Unfortunately, it

XI. has also proved that the provision made in the statute for the extension of the system throughout the country through the conversion of its opponents has failed in its effect. There can be no doubt that the extension is desired by the majority of landowners. If any further proof were wanted, it is furnished by the overwhelming majority by which the House of Lords affirmed the principle of compulsory extension in a recent debate. Voluntary extension having failed, and the need for extension being shown, it is now vitally necessary to obtain more effective powers for the compulsory extension of the system.

Law of Property Bill

The Law of Property Act, which received the Royal Assent in the summer of 1922, therefore, proposes to remove those obstacles to extension which have hitherto stood in the way, and to enable the Lord Chancellor of the day—after such enquiry as is called for the purpose of enabling opponents to ventilate their views and, if they can, make good their case, and subject to the passing of a resolution by one House of Parliament or the other—to make compulsory orders requiring land to be registered on sale in the locality to which the order relates. The work of placing the whole of the land in this country upon the register must necessarily take many years, and the Act accordingly contemplates the intervention, before the operation is fully completed, of a period which may be short or long as events dictate, during which the system of compulsory registration will

be extended county by county throughout the Kingdom. The Act itself further contains provisions which will interpose a delay before this process can begin. The Bill, as introduced, provided that no order applying the compulsory provisions to any county should be made until two years from the commencement of the Act, and not more than one order should be made within the period of three years. Periods of this length are as nothing in the life of the nation, or even in the life of a system of land transfer, and I did not myself consider as essential to the principle of the Bill the particular periods originally specified in it. XI.

During subsequent stages, with a view to accustoming the profession gradually to the working of the system, and stilling the apprehensions which are, I think unnecessarily, entertained by them, it was thought desirable further to extend these periods. The principle still remains, and, the Act once passed, we may look forward to a time when land, though it can never be transferable with the same certainty or rapidity as a parcel of stock or a share, can still be conveyed from man to man without the intolerable prolixity and complication of even our improved system of conveyancing.

Simultaneously, the Law of Property Act proposes to effect a greater simplification in the practice of conveyancing than any measure hitherto proposed, while at the same time it retains the present power to settle land. The body of law upon which it operates is in itself extraordinarily complicated and technical, and

XI. the Bill itself is of necessity also complicated and technical, by reason of the mass of statute and other law, with which it deals and either repeals or renders obsolete. In preparing it and carrying it through its successive stages, I have done little more than take up the torch which was carried by my learned friend and predecessor, Lord Haldane, to whose great efforts in this thankless task the gratitude of both branches of the legal profession and all those among the lay public who are interested in land must always be due. As the result of his labours, which were interrupted by the outbreak of the War, we were able to put forward our proposals in a form which we believe to be acceptable to the great mass of expert opinion and with the support of the whole body of the law societies of the country.

Features of the Bill

I can do no more than refer to some of the more important features of the Bill. Its general principle is to assimilate the law of real and personal estate and to free the purchaser from the obligation to inquire into the title of him from whom he purchases, any more than he would have to do if he were buying a share or a parcel of stock. Incidentally, it has been necessary to make elaborate provision for the devolution of land upon intestacy, so that, as far as possible, the sexes may be placed upon an equality. Copyhold tenures—the evil of which is universally recognised, but the enfranchisement of which, under the existing law, proceeds but

slowly—are abolished *uno flatu*, and elaborate provision is, of course, required to work out the compensation for the lord and the steward. Beyond this, the Act contains a very great number of technical amendments of the Settled Land Acts, the Conveyancing Acts, and the Trustee Acts, and some further minor provisions which, it is believed, will be helpful in business. XI.

The Act is of vast length. As it came from the Joint Select Committee of both Houses, over which Lord Haldane presided, it covered 276 pages and contained 185 clauses and 16 schedules. I am confident that the Act is called for urgently by the circumstances of the time, and I made every effort to pass it into law at the earliest moment when Parliamentary exigencies allowed. I had some hope of placing it upon the Statute-book in the course of the Session of 1920. Unfortunately other more pressing legislative needs prevented me from doing so in that and the succeeding year, but I had the pleasure of seeing it reach the Statute-book in the course of this year.

The House of Lords

The constant attention of all Lord Chancellors is directed to the law of machinery and procedure under which our legal system is worked, and projects with reference to these matters are always before me, as they have been before my predecessors. To begin with the highest Court in these islands—the House of Lords sitting in

XI. its judicial capacity—it does not appear to me that since the alteration in the Standing Orders initiated by Lord Buckmaster, which reduced the period of time within which an unsuccessful litigant could appeal to this House, any changes are called for. The Court is constantly at work, and the great volume of causes which come before it, especially from Scotland and Ireland, seem to indicate general satisfaction on the part of litigants.

"Imperial Court of Appeal"

From time to time the institution of a Court of Imperial Appeal is mooted, and we know that some colonial statesmen—though not all—are anxious for the establishment of such a Court in London. In my judgment, the time is not yet ripe for the final discussion and settlement of this question, but in any discussion or any settlement I attach the greatest importance to the preservation of the appellate jurisdiction of the House of Lords as it now is, and I entertain the greatest doubt whether the institution of any other tribunal otherwise constituted would give to litigants, and particularly to litigants from Scotland and Ireland, the same prompt, efficient, and satisfactory justice which they receive at present.

The Judicial Committee

There are, however, matters connected with the Judicial Committee of the Privy Council—

the Imperial Court of Appeal from his Majesty's Dominions beyond the Seas—which call for alteration. I think that all those associated with that Court, whether as Judges or as advocates, would welcome its installation in buildings which, in their material aspect, should correspond more nearly to the vast imperial issues which are there decided. Unhappily, for the time being, more pressing calls upon the national purse prevent the accomplishment of this desire; but I must express the view that dignified surroundings are something more than a mere ostentation and a mere convenience, and that the justice of so great an Empire should be enshrined in a certain spaciousness.

Meanwhile, there are certain immediate measures which are in process of being taken or require speedy action. The Lord President of the Council, the Secretary of State for India, and myself have represented to the Treasury that means must be found for strengthening the Indian representation upon the Judicial Committee. The Indian work which comes to that Committee vastly exceeds in volume all the work which comes from all the other Dominions. The questions of law which arise are strange to Western ears, and the manners and customs of the people upon whom that law operates are also strange. It is, therefore, essential to the proper administration of justice that there should always be upon the tribunal men bringing experience of Indian law and of Indian life and custom. The meagre allowance available under the present statute is insufficient to attract men of sufficient standing

XI. and mental calibre. Until now the Court has depended upon the gratuitous assistance of such distinguished, retired Indian Judges as Sir Lawrence Jenkins, and the all but gratuitous labours of Sir John Edge and Mr. Ameer Ali. I am glad to think that at an early date more adequate remuneration will be found by the Treasury for this purpose.

In other, but somewhat more technical, matters, the procedure governing Indian appeals requires attention. The India Office is, I believe, in consultation with the Viceroy upon this subject, and I hope that the result may be a decrease of cost to litigants and, perhaps, without the curtailment of any proper opportunity for appeal, a reduction of the almost intolerable length and prolixity of some Indian lawsuits.

The Supreme Court

When we come to our own Supreme Court of Judicature, our main anxieties arise from the enormous increase of business in the King's Bench Division and in the Probate, Divorce, and Admiralty Division. The work in the King's Bench Division, which fell off very seriously during the War, showed signs of increase almost immediately after the Armistice. That increase has continued and grown throughout the calendar year 1920, and it may be stated—though exact figures are not available—that there is now a greater press of business than has ever been known in the history of the Courts. As showing the stability of our judicial institutions and the confidence

felt in them by the mass of the population, and especially by the business community, this state of affairs is highly satisfactory. There are countries and have been periods where and when a litigious tendency among the population generally is a bad element in the national character. It appears, however, that the great volume of business now coming to the Courts is legitimate business, arising from the needs of a greatly increased population, stimulated in part by the disturbance of commercial conditions which was a direct result of the War. XI.

The result, however, is to put a very severe strain upon our judicial machinery. It has already been necessary to have recourse to the provisions of the Supreme Court of Judicature Act, 1910, under which both Houses of Parliament have passed resolutions calling for the appointment of two extra Judges, and two appointments have been made accordingly. It is, however, very doubtful whether even this measure of additional judicial strength is sufficient to cope with the emergency with which we are faced. That emergency is increased by the fact that it was necessary to set free Lord Trevethin and Lord Hewart in succession from their regular judicial work in order that they may preside in the War Compensation Court, a measure not open to the criticism usually appropriate to the detachment of Judges for extra-judicial work, inasmuch as the work which is to be done by the War Compensation Court, if it did not exist, would fall to the lot of the ordinary Courts of Justice. In fact, through the public spirit of those gentlemen who are serving,

XI. some for a fee which is little more than honorary and some wholly gratuitously, we have in this Court a Tribunal which is in some sense auxiliary to the ordinary Courts and commands, in the persons of Sir William Taylor, Sir Dunbar Plunket Barton, and Mr. Hamilton, the services of men of high judicial qualities and great legal experience, as well as the unique tact and knowledge of Sir Matthew Wallace.

The Increase in Divorce

It is not only in the King's Bench Division that the volume of work has increased beyond any reasonable anticipation. If that increase is considered in relation to the judicial strength available, the heaviest additional burden has fallen elsewhere. The work of the Divorce Court, so far from falling off during the War, continually increased, and has now assumed gigantic proportions. As a consequence it has been necessary to lend to that Court the services of Judges of the King's Bench Division, and while this expedient is within the contemplation of the Judicature Acts and is an apt illustration of the elasticity of the system established by these Acts, it has entailed a heavy tax upon the time of the King's Bench Judges, and so long as it continues necessary must render it impossible to maintain these Judges at a less number than that lately authorised, and must cause the gravest fears that a further increase may be necessary.

The heavy weight thus thrown upon the Probate Division has caused me frequently to con-

sider means whereby more permanent relief could be obtained. At the same time, my attention has been directed to the inconvenience and expense which are entailed upon litigants by the necessity of prosecuting all divorce proceedings in London. XI.

The increase of divorce petitions is especially noticeable among the poorer classes, partly as a result of the War—direct or indirect—and partly by reason of the facilities for cheap litigation which the Poor Persons Rules offer to persons of slender means. The hardship to such persons of being obliged to resort to London, in order to obtain that relief from an intolerable wrong to which they are entitled under the law, is obvious. Various remedies for this evil have been suggested. It has been proposed that the work of the Divorce Court, so far as it is concerned with persons of limited means, should be devolved upon the County Court, or that the Divorce Court Judges should go circuit for the purpose of trying divorce petitions, or that these petitions should be tried during the course of the ordinary circuit by the King's Bench Judges.

The first proposal seems to me to be open to three criticisms—first, it would be an evil to institute a system under which it would result in appearance that the poor litigant should be forced to take his matrimonial grievances to an inferior tribunal. In other matters the distinction between the jurisdiction of the High Court and the County Court depends upon the value of the amount at stake and not upon the social status or the pecuniary position of the litigant. The importance of a matrimonial cause cannot be

XI. measured by these standards, and if the rich are allowed or compelled to resort to the High Court in London, the same privilege cannot be denied to the poor.

Secondly, the exercise of the jurisdiction in matrimonial causes in many cases involves a discretion on the part of the Judge. It is highly important that that discretion should be exercised on uniform lines. This can be accomplished only where the jurisdiction is exercised by Judges who are in frequent contact one with another, and uniformity is, of course, more likely to be found the more limited the number of Judges in whom the discretion is vested. To vest the discretion in more than 50 County Court Judges scattered throughout the country, or in an indefinite number of Commissioners, as proposed in Lord Buckmaster's Divorce Bill when it was first introduced, would necessarily result in a great variation of practice, which, in my view, would be harmful to the best interests of the community.

Thirdly, the conferment of this jurisdiction upon the County Court would, in my view, exercise the most detrimental influence upon the Court itself. The County Court exists primarily for the decision of small disputes and the collection of petty debts. It is of vital interest that its justice should be not only well informed and impartial, but also expeditious, and the addition to its labours of so vast a mass of litigation would impede its operations to such an extent as to inflict the gravest hardship upon the community at large.

Divorce Trials on Circuit

The proposal that the Judges of the Probate Court should go circuit seems to me to be equally impracticable. It would involve very considerable expense; and the withdrawal for the purpose of sitting in the country of one Judge from the limited number available for the trial of Divorce, Probate, and Admiralty work would result in an even greater congestion in the work of the Court than exists at present. XI.

We were, therefore, forced to the third remedy, and I introduced a Bill into the House of Lords under which it will be possible to send divorce cases, or certain specified classes of divorce cases, for trial on Circuit by the King's Bench Judge. Such a course could not have been taken save with the consent of the existing Judges of the King's Bench Division, who were good enough to express their willingness to do the work. The Act has passed into law and it is proposed that in the first instance the only cases to be sent to be tried on Circuit should be undefended cases and cases arising under the Poor Persons Rules. It is, of course, necessary to avoid the detention of the King's Bench Judge on Circuit for any great length of time, and if he were to find himself involved in one of those disputed cases which sometimes occupy the time of the Court for a period which many regard as disproportionate, the remedy would be worse than the disease. Undefended divorce cases, although it is necessary that upon them the case for the petitioner should be strictly proved, do

XI. not in practice occupy much time, and the relief to the petitioner of being able to bring his witnesses to a town some reasonable distance from his residence, instead of to London, will be considerable. It is found also that poor persons' cases do not, as a general rule, occupy the time of the Court to the same extent as other cases of a similar nature, and it is especially upon persons admitted under the Poor Persons Rules that the hardship of bringing witnesses to London and keeping them there for an indefinite time lies heaviest.

Position of the President

At the same time, the Act to which I have already alluded made a change in the status of the President of the Probate, Divorce, and Admiralty Division. The President, unlike the Judges who preside over the Court of Appeal and over the King's Bench and Chancery Divisions, was not marked out from his brethren by any addition of salary or precedence. This did not seem to me to be appropriate to a Judge in the position of the President, having the care of vast interests and exercising a considerable patronage. To say nothing of the eminent men who in times past have occupied that position, the office has lately been adorned by Sir Samuel Evans, who rendered such inestimable services during the War, in the Prize Court, and by Lord Sterndale, the present Master of the Rolls. Sir Henry Duke surrendered his position as a Lord Justice of Appeal, in exchange for no personal advantage,

to accept the far more laborious office which he now holds. The time is, therefore, appropriate to mark the importance of the office by giving the President precedence next after the Master of the Rolls and before the Lords Justices. XI.

I have already said that the measures which we have taken for dealing with the pressure of work in the Divorce Court and the appointment of additional Judges to the King's Bench Division are barely sufficient to enable that Division to cope with the work which it has to do. We have by an Act passed in 1919 found some relief for the King's Bench Division by a further devolution upon the County Court. It remains to be considered what additional means are available for obtaining either increased help or a more expeditious manner of dealing with the work.

The Circuit System

It has been suggested, in the first place, that certain work performed at present by the King's Bench Division might be transferred to the Chancery Division, where the increase since the end of the War has not been so pronounced as upon the Common Law side. The matters alluded to are the bankruptcy work and the revenue work. The bankruptcy work has been transferred, but the difficulties in the way of making any transfer of the Revenue work are formidable, and I am not at present convinced that they can be overcome. If, indeed, any effective method can be found of employing more profitably the time of the Judges available to deal with King's

XI. Bench actions, it must be in some revision of our Circuit arrangements.

Proposals have from time to time been made for a drastic alteration of our system of judicature, whereby the ordinary work of *nisi prius* would be decentralised and dealt with by district Judges, and the Courts in London would become little more than Courts of Appeal. On the other hand, it has been suggested that a greater measure of centralisation rather than decentralisation is called for, and that, while further jurisdiction might be conferred upon the County Court, the trial of civil actions should proceed in London, the Judges proceeding for the purpose of trying crime to some very few provincial centres.

To all proposals under either of these two heads I am definitely opposed. It may, I hope, be found possible gradually to extend further the jurisdiction of the County Court, especially for the purpose of dealing with cases which, if they proceeded in the High Court, would receive summary treatment under Order XIV. of the Rules of the Supreme Court. This process must be a gradual one, and the possibility of pressing it on must depend to some extent upon the strengthening of the machinery of the County Court by methods of which I will say something at a later stage; but the Circuit system not only corresponds—as its history shows—to the characteristics of the community and the constitution with which it has grown up, but in modern days fulfils functions which are no less but rather more necessary than in the past.

The advent of the High Court Judge in a pro-

vincial town, and especially in a provincial town possessing a large local Bar, impresses upon all those concerned in the administration of the law the sense of unity of our judicial system; it raises the tone of both branches of the profession, and it is universally recognised that it has a deterrent effect upon crime. Useful and indeed necessary as decentralisation may be in matters of machinery, it is of vital importance that the law should be administered uniformly as well as rightly and impartially, and for these purposes I do not think a better system could be devised than that of the Circuit. XI.

Reform of Circuit System

If, however, this system is to continue, it must, I think, be adapted more closely to modern needs. Already, under the Assizes and Quarter Sessions Act and under the Winter Assizes Act, on the one hand the criminal assize has been lightened of the less important cases, and on the other hand certain Circuit towns have been grouped for certain assizes. In my personal view, it is most desirable to promote further this latter tendency, and I think that the time has now come, having regard to the change in the relative density of population in the country, when some at least—if not all—of the places dealt with by Orders in Council made under the Winter Assizes Act should disappear altogether from the list of the Assize towns. In addition, it is worth consideration whether other towns might not also be dealt with in similar fashion.

XI. Such a change would result in a saving of judicial time proportionate to the number of places eliminated and in a very considerable saving in expense.. In some of the places which would be dealt with there is no longer a gaol, and prisoners in the county are confined in the gaol of a neighbouring county, so that when the Judge visits the gaolless Assize town the prisoners, at considerable expense and trouble, have to be fetched from the one town to the other for trial and taken back again. Some of these gaols were abolished some little time ago, and in the course of the War several further gaols in similar places have been dismantled or converted into military prisons.

Some consequential arrangements will have to be made beyond those contemplated by the Winter Assizes Act. Under present arrangements, prisoners from the county in which the Assize is not held are tried before a jury of the county in which the Assize is held, and if the former place has ceased to be an Assize town, it would only be just that the inhabitants of the county which provided the criminal should bear in due proportion with the county where the prisoner was tried the burden of finding jurymen for the purpose.

The difficulty in taking any such course as this arises not from either branch of the profession nor from among the Judges, but from local opposition and the pressure which the locality is able to bring to bear upon its member of Parliament. It rests with me to persuade, if I can, my colleagues of the Cabinet that this

opposition and this particularism must give way for the general good. I must say most emphatically that so long as the King's Bench Judges are compelled to travel throughout the country to places at which there is no business, or very little business, the resulting dislocation upon the work of the Division is most serious, and that no arrangements for dealing more effectively with the King's Bench work can be made until the number of Assize towns has been considerably reduced, and those eliminated whose position as Assize towns depends merely upon historical associations and not upon their importance as business centres or centres of population. XI.

Poor Persons

I have already had occasion to mention, in connection with the work of the Probate Division, the Poor Person litigant. The problem here arising is pressing and important. Very shortly before the War the old system of litigation *in forma pauperis* was in effect superseded by the new system set up under the Poor Persons Rules. This new system was in its nature experimental, and it is unfortunate that it should have been—as it has turned out—subjected to the test of experiment at the moment when the War, uprooting old social conditions and instincts, produced a flood of work in the Probate Division. The result has been to subject the system to the greatest stress at a time when, being in its infancy, it was least suited to bear it.

XI. It was only natural that certain defects should reveal themselves. They and the remedies for them can be found fully discussed in the report of the committee presided over by Mr. Justice P. O. Lawrence. Put very briefly, they amount to this, that unless and until some fund is found, either from the State or from private benevolence, the facilities offered by the Rules to Poor Persons cannot effectively be employed except in those cases where the parties are able at least to meet the out-of-pocket expenses which are involved in the procuring of evidence and the maintenance of witnesses at the place of trial; and further, that while much zealous and gratuitous work has been done by members of the Bar, there has sprung up an unfortunate custom whereby solicitors in some cases—I fear in too many cases—have been enabled, under the name of out-of-pocket expenses, to turn charity into a lucrative business. As a result of Mr. Justice P. O. Lawrence's report, the Rule Committee of the Supreme Court have framed new rules which came into operation on January 1, 1921. The main features of these rules are two:

(1) They require payment from each poor person of a sum, small in itself, but sufficient, on the average, to ensure that there will be enough money available for out-of-pocket expenses, and therefore that his action will not fail when it has proceeded through its preliminary stages through the lack of means to bring witnesses to Court; and (2) they are designed to prevent absolutely the making of

any profit, under whatever colour, by any professional person engaged in the conduct of a poor person's case.

If these rules are to succeed, it will only be with the hearty and cordial support of both branches of the legal profession. So far as the Bar is concerned, there will probably never be wanting a supply of young men who, in return for their gratuitous services, at least obtain experience and learn to feel their legs in Court. The burden laid upon the solicitors is far more heavy. It is upon the co-operation of them, and particularly of the larger and more famous firms, that I rely for the success of the new scheme. I should indeed be ungrateful if I did not acknowledge here the goodwill with which the Law Society have welcomed the proposals, and the promise, which I think I discern, of a general co-operation from the profession at large.

Judges' Salaries

There remain three matters in relation to the Supreme Court which, though they are primarily domestic concerns, are ultimately of great interest to the nation at large. It will be necessary at no distant date to reconsider the salaries at present paid to the Judges in the Court of Appeal and the High Court. It is essential for the proper conduct of judicial business that the Judge, when appointed, should be above any financial cares, and should hold such a position as enables him to carry authority among those of the Bar from whom he has been

XI. chosen and who practise before him, as well as among the general body of litigants. It is also necessary that the office should be so remunerated as to secure the services of barristers who are in the first rank of their profession. It is impossible to say that in present circumstances the first of these requirements, namely, that the Judge should be above financial cares, is obtained. The nominal salary of a Judge is, save in some exceptional cases, £5,000 a year. From this is to be deducted a 6s. income tax and a further sum as supertax, which varies in different cases according to the private means of the gentlemen in question, but is in any event substantial. The heavy fall in the value of money probably reduces the fraction of the income left over after these deductions by one half. A Judge has no means of increasing his income, and but scant means of reducing his expenditure. On the other hand, the average income of members of the Bar, especially of those members from among whom the choice of Judges can be made, has increased very greatly. I anticipate that, if no such measure as I have suggested is taken, the Lord Chancellor of the day will have a great difficulty in filling vacancies upon the Bench. Indeed there are not wanting signs that we may even be faced by the possibility that those already on the Bench, still in possession of their full health and vigour, may be indisposed longer to serve for an income which bears no relation to that which they might earn if they were free, and may consider the question of returning to practise at the Bar. If either of these two things happened, there would be grave

reflection upon the prestige of the Bench, and a serious blow would be struck at the whole of our system of judicature. XI.

So far as I am aware, all other servants of the Crown, except Cabinet Ministers and Judges, have received additions of salary or bonuses to compensate them in some degree for the altered circumstances in which we live. A Committee is sitting, or is about to sit, upon the question of Cabinet Ministers' salaries. I think that as a mere measure of justice, as well as of expediency, treatment similar to that which has been meted out to other classes must be extended to his Majesty's Judges.

Economies at the Courts

On the other hand, there are considerable economies to be effected in the offices of the Courts, and it is probable that there is considerable additional revenue to be obtained without imposing hardship upon any one. As to economies, the Royal Commission on the Civil Service, reporting in 1915, made numerous proposals for the reduction of the establishment of the Courts, and for the imposition of such rules as would lead to the retirement of the officials when they had passed the age at which full vigour may normally be looked for—proposals in themselves which are directed to, and in other cases have resulted in, economy. The Commission recommended that their proposals should be worked out in detail by a small Committee of experts. The dislocation caused by the War, which was reflected in

XI. the offices of the Courts, as elsewhere, delayed the efforts of my predecessors to act upon this recommendation.

A Committee has, however, now been sitting for some years under the presidency of Mr. Tomlin, K.C., and the work, which is laborious and thankless, is drawing to its conclusion. In accordance with the recommendations of that Committee, very large reductions have already been made in many of the offices, and very large economies have been, or are in the course of being, effected. The work could not be carried through were it not for the self-sacrificing help of many of the officers affected, and, I fear, in some cases, affected unfavourably, by the proposed changes. I believe that in the result the greatly increased volume of work which is to be dealt with will be done by a largely decreased staff, and I trust that in the course of the changes, it has been, or will be, found possible to satisfy, so far as the needs of the public service allow, the reasonable claims of those who suffer by them.

It was necessary in connection with these changes to confer certain additional powers upon the Lord Chancellor and upon the Treasury by legislation, and in particular to place upon a modern footing the arrangements for the Chancery Registrars' Office, which are at present regulated by an Act of 1842, in itself somewhat cumbrous and long out of date.

In the Session of 1921 legislation was introduced dealing with the retirement of the superior officers of the Courts, such as the Masters and Registrars, upon their attainment of a suit-

able age, and instituting for them a system of pensions, which will not in itself impose any additional charge upon the Exchequer, but will be more suited for the circumstances of men who necessarily enter the public service at an age later than that of most Government servants, and whose special work is such as to justify their continuance in office up to a slightly greater age. XI.

Court Fees

On the revenue side the question of the fees to be taken in the Courts has not received attention for many years, and it is imperative that the scale should be adjusted to modern conditions, and in particular to recent changes in the value of money. Now that a complete system of devolution to the County Court has been established, it may be anticipated that the amounts at stake and the actions tried in the High Court will be on the average higher and more important than they used to be, and they will therefore be capable of supporting, without hardship to the litigant, the imposition of a fee which, without the addition of any material percentage to the cost of litigation, will produce a substantial sum in the aggregate. The fee upon a writ or other originating process was doubled in the course of 1920, without, so far as one can see, affecting in the smallest degree the number of writs or other originating process issued. Indeed, as I have already said, that number has increased almost incredibly in the last few months. The remaining fees are of some complexity, and it is

XI. impossible to deal with them in a summary manner. The question of what should be done with regard to them was remitted to a committee which sat at the Courts under the chairmanship of Sir Malcolm Macnaghten. I received from them a comprehensive report, in the light of which, with the concurrence of the Treasury, I was able to reduce anomalies and at the same time obtain an increased revenue.

There are two other matters of general interest which affect the administration of justice generally throughout the country. The principal provisions of the Bill which I introduced in the House of Lords in the autumn of 1920, and which passed in that year, are designed to carry out some of the recommendations of a committee which was appointed by and reported to Lord Finlay, on the subject of foreign and British judgments at home and abroad respectively. That committee was a very strong one, presided over by Lord Sumner, and comprising among its members Lord Justice Atkin and other persons well qualified to give an opinion on the needs of the business community, as well as on the very difficult and technical matters which came before them. Their recommendations fall into three parts: Those requiring legislation (which are dealt with in the present Act); those requiring only the making of rules of Court (which were dealt with in the course of the summer by the Supreme Court Rule Committee); and those requiring the making of conventions or treaties with foreign States, upon which the Foreign Office are at present engaged.

Proceedings Against the Crown

The other matter concerns proceedings by or against the Crown. The law relating to this matter is cumbrous and antiquated, and imposes at the same time impediments upon the Crown and hardships upon the subject. The Crown cannot sue or be sued in a County Court. The procedure upon information is medieval, and so technical that its mysteries are known only to a very select body of officials and practitioners. The Crown cannot be sued *in tort*. Further, the multiplicity of new Government offices has rendered unsuitable a procedure which was invented when the functions and the servants of the Executive were very different from what they are now. The subject is full of difficulty and requires mature consideration, but I hope that at an early date I shall be enabled, with the concurrence of the Attorney-General, after considering the observations of the legal advisers of the different departments, and especially those of the Inland Revenue and the other Revenue Departments, to introduce a Bill which will be of solid advantage both to the Crown itself and to all those with whom the Crown is brought into contact in litigation.

There is one further matter to which I should allude before I leave the subject of the Supreme Court—that is, the consolidation of the Acts relating to the Supreme Court of Judicature. The statutory provisions regulating the Supreme Court are now scattered over some 47 volumes of the Statute-book, and I concur in the desire,

XI. which has been widely expressed, that they should be brought together. The work must take time, for it requires highly expert treatment, and the documents to be incorporated are voluminous. I believe that this is a matter to which the Law Society attach great importance, and I share their views on the point. Perhaps, also, it is relevant to call attention to the fact that in the course of my tenure of office the custom of holding once a year a Council of Judges, prescribed by the Judicature Acts, has been revived. The first Council, held after a lapse of years, met in the House of Lords in 1919. Henceforth I shall follow what appears to be the natural course of obeying the directions of the statute, and I hope and believe that, from consultation with the eminent men who constitute the Judicature, we shall be enabled to glean much light upon the problems that confront us, and the means whereby they may be solved.

Changes in the County Courts

I turn to the County Court. I was fortunate enough in the course of the Session of 1919 to conduct through the House two measures relating to County Courts. One of them—the County Court Judges (Retirement, Pensions, and Deputies) Act—effected a reform which had for long been desired. It imposes a retiring age upon County Court Judges appointed in the future, and, on the other hand, systematises the pension arrangements for retiring Judges. The extent to which this measure was welcomed on the

County Court Bench itself may be measured by the fact that a very large proportion of Judges already in office exercised voluntarily the option to adopt its provisions. I have no doubt that the result will be to maintain the present high level of efficiency upon the County Court Bench, and to confer thereby an advantage upon litigants, while I have the satisfaction in saying that, so far as our estimates enable us to judge, it will not impose any additional charge, on the average, upon the Exchequer.

The other Act—the County Courts Act, 1919—comprises a number of miscellaneous provisions, the need for which has for some time been apparent. The main trend of these provisions is in the direction of increasing the jurisdiction of the Court. For that purpose, it increases the power of the High Court to remit to the County Court actions which could more suitably be tried there, and penalises those litigants who take up the time of the High Court with matters which can be as expeditiously and as properly disposed of in the County Court. The effect of the Act is already apparent in the large increase in remitted actions, especially in the great centres of population.

One provision of the Act was aimed at the establishment of a long-desired system of summary judgment in the County Court, similar to that which prevails in the High Court under Order XIV. of the Supreme Court Rules. This provision and the rules which have been made under it by the County Court Rule Committee, and approved by the Supreme Court Rule Com-

XI. mittee, are at present only tentative. Before such a summary process can be made of universal application in the County Court it will, in the opinion of myself and of those most conversant with the business of the Courts, be necessary in some ways to strengthen the machinery of the County Court itself.

County Court Machinery

The next task, therefore, of the legal reformer in dealing with the County Court will be twofold —the establishment of the necessary machinery and, when that has been established, the devolution upon the Court of the power to deal effectively with such matters through the machinery thus established.

So far as the machinery and administration are concerned the County Court has recently entered upon a period which must, I fear, be described as one of acute crisis. For many years the financial system of the Courts has depended upon the fees taken in them. In their origin the Courts were intended to be Courts for the collection of petty debts, and though from time to time endeavours have been made—which have been in part successful—to devolve upon the Courts matters involving more substantial issues and greater sums of money, their main staple work remained, up to the War, what it had been at their inception. The revenue upon which the Courts depended for the payment of their officials was drawn from the fees taken upon the business done in the Courts—the main source of that

revenue being the fees taken upon the smaller matters. As in our judicial system generally, those cases which occupy most of the time of the Court, and in particular most of the time of the Judge, were the very matters, taken in the aggregate, which produced least revenue. XI.

In the early days this may have been a very appropriate method of business. The result was that the Registrar was paid by results, and as the clerks were his servants, their remuneration depended to some extent upon his success. I am not clear, however, that this arrangement made for economy in any real sense. It is true that it obtained for the service of the Courts practising solicitors who depended for the greater part of their income upon their private business and brought to the national service high qualities of independence, learning, and impartiality. In some cases, however, the result was that the Registrar was over-remunerated for the work which he did, and in others that he was under-remunerated, while the clerks of recent years have manifested, not unnaturally, a growing dislike to remaining the private servants of the Registrar when they were solely employed on the work of the State.

The War caused a great falling-off in litigation in every Court from the highest to the lowest (except, of course, the Divorce Court), but this falling-off was greater in extent and more serious in its consequences in the County Court than elsewhere. Not only did the ordinary litigant desist from endeavouring to enforce his remedy, so far as the Courts Emergency Powers Acts still

XI. left him in a position to do so, but, further, the great economic and social changes in the position of the working classes produced an almost complete cessation in the debt-collecting work of the Courts; the fact being that the working classes generally, possessing to an unusual extent ready money, paid their debts. As a result of this, the income of the Courts almost entirely disappeared. The remuneration of those Registrars—the great majority of the whole body—who depended upon fees, was reduced, in some cases, by as much as 75 per cent, while at the same time the rise in the cost of living compelled them to make an effort to increase the salaries of their staffs. The result was that a system which was already a bad one, fell into a condition which can only be described accurately as chaos.

Very great distress resulted, which the Treasury have endeavoured to mitigate by the payment of war bonuses to the staffs and of a sum, under the name of bonus, but in fact calculated as a proportion of the loss sustained, to the Registrars. The Courts, therefore, instead of being in a position in which their revenue roughly balanced their expenditure, have now become a source of very grave loss to the community.

Debt-collecting Work.

I see no immediate possibility of a return in natural course to the previous state of affairs. It is possible, and indeed probable, that the debt-collecting work may increase—indeed, there are already signs of such an increase. But, in the

opinion of the observers best qualified to judge, years must elapse before the revenue balances the expenditure. Meanwhile a considerable change has taken place in the nature of the business of the Courts, and there is evidence of a great increase in the number of the larger actions, which, as I have already said, are those imposing in the long run the greatest expenditure of time and money. XI.

This disastrous state of affairs has this advantage, that it enables us to consider the whole structure of County Court machinery and finance with the certainty that no new system proposed can be more haphazard and essentially extravagant than that now in existence. The whole question has been recently under the consideration of a committee, appointed by myself, under the chairmanship of Mr. Justice Swift. The proposals which the committee make are of a far-reaching nature, and will require most careful consideration by myself and the Treasury. I hope that there may be evolved a system which will result in the gradual elimination of the part-time Registrar and in the strengthening of the framework of the Courts generally by the gradual extension of a system of whole-time Registrars, and by producing some measure of contentment among the staff, who are, I fear, at present discontented.

If this can be done, the first step will have been taken to the institution of a summary Order XIV. procedure throughout the County Courts in the country generally. Such a system can be operated by whole-time Registrars without

XI. incurring the mischiefs which would be incidental to it if it were in the hands of gentlemen carrying on private practices of their own. At the same time, it is urgently necessary, in the interests of economy and efficiency, that further measures of grouping should take place among the Courts; that Courts established in those centres of population which have shrunk in importance should be diminished in number or grouped with other more important Courts; and that, while the total facilities for the collection of small debts and the hearing of small actions should not be diminished on the whole, arrangements should be made for accomplishing these desirable objects without the present waste of time and money.

XII

LADY GWENDOLEN CECIL'S *LIFE OF LORD SALISBURY*

THE *Life of Lord Salisbury*, by Lady Gwendolen Cecil, is a weighty and dignified memorial of a very weighty and dignified statesman. It lacks, indeed, in some respects the light and shade of Mr. Churchill's brilliant biography; but it is an extremely competent and even skilful piece of work such as a daughter may offer in tribute to a father's memory, with the feeling that a pious duty has been well and faithfully rendered.

The character of Lord Salisbury has always appeared to me to be one of profound interest. When I was first engaged in politics in the 'nineties he was on the road to attain canonisation as the leader of a cautious Conservatism. His record as the master of "flouts and gibes and jeers," or as the possessor of a "rash and rancorous tongue," was beginning to fade into mist, although there was still some talk of "blazing indiscretions." How was it possible to combine the idea of the Lord Robert Cecil of 1867 with the picture of the elderly statesman sitting at Hatfield in an almost sanctified serenity from 1895 to 1902?

The answer to this question is not contained

XII. absolutely in the first two volumes of his official biography. The narrative stops short at 1880. Though it shows the process of change beginning, it does not tell the story of its completion. What it does depict is something even more interesting —the nature of quite a third Lord Salisbury who existed from his birth in 1830 to his marriage in 1857. That a politician should tone down the exuberances of his earlier methods as the years go on is understandable—though the change in Lord Salisbury's case is markedly abrupt. But that a boy who was always retiring, awkward, and even timorous, in manner—though not in conviction—who entered Parliament and yet made no special mark there, except for earnestness, should suddenly produce a flashing power of epigrammatic irony and a tongue the effrontery of which could put even Gladstone to ridicule, is one of the most remarkable cases in political development of our times. The late Lord Salisbury's mother died when he was ten years old. His father, though kind, did not understand him. He had the type of mental and physical delicacy, though not the beauty, of a youthful Shelley. His private school he describes as "a kind of Hell." He worked hard and brilliantly at Eton, but was so badly bullied that his mind and body failed, and his father had to take him away. Then he went to Christ Church.

One could wish that the author had given a fuller picture of his Oxford days. Here at last, as in so many similar cases, his intellectual promise was recognised by his contemporaries. He became Junior Treasurer of the Union, where

his bust now stands in the Debating Hall. His health failed, and Sir Henry Acland sent him round the world. He returned and entered Parliament for a close borough—without a contest. Through all this period he shows not the slightest sign of practical ability or of the kind of man he is going to be within a brief space of years. His letters from the Colonies are dull, not to say priggish. Disraeli, writing to the second Marquess, to whom he had every reason to be polite, on his maiden speech, strains his power of flattery to the breaking-point. "Of Lord Robert I have no hesitation in saying that if he will work, and he has a working look, I will make a man of him." There is a prophetic irony in the subdued compliment.

Where, in all this, can one recognise Lord Salisbury either in early middle or early old age?

With his marriage, which inspired him with an entirely new spirit and with a consequent lack of money which taught him perforce how to write, the scene changes as though by magic. An entirely new personality breaks on to the stage.

From some ancestral cavern of the mind a power is released. Whether it comes from the old Burleigh of Tudor fame or from his grandmother, the terrible and admirable old Lady Salisbury of whom Creevey is never tired of talking half in derision and half in fear, while the Hertfordshire villages still wonder at her plush dress and her coach, does not matter. A new Robert Cecil considers the scene in Parliament.

XII. It may be taken for granted that the brilliant disquisitions on general politics in this work, written by one who had an intimate knowledge of the mind of the late Lord Salisbury, represent his attitude towards affairs, even where they are not reinforced by written or spoken testimony.

The situation in Parliament in the 'fifties and early 'sixties was an unreal one. No great issues separated the contending groups into definite parties divided by real principles. The Tory Party had been hopelessly broken by the Free Trade schism of 1846. The Whigs and Radicals, though nominally combined, agreed on no fundamental issue of policy. The Peelites, surviving their founder, would neither rejoin the Tories when Protection had been abandoned nor unite themselves permanently with the Whigs. They simply existed as a loose force ready to overturn any Government on a chance issue.

As a consequence the Whig-Radical Coalition would survive for a few years, generally and especially if under Lord Palmerston without any advantage to the Radical policy, until they were turned out by a Radical secession. The Conservatives then took their place for a month or a year until their various opponents rallied once more against them. "The Whigs," wrote Lord Robert in 1865, "furnish the placemen, the Radicals furnish the votes, and the Conservatives should furnish the policy." This is, in fact, what happened from 1848 till the death of Palmerston in 1865.

What in these circumstances was the best policy for the Conservative Party? Mr. Disraeli

had a clear view, which has been summed up by several dictums attributed more or less impartially to him or to Lord Randolph Churchill: "The business of an Opposition is to oppose"; "put the Government in a minority whenever you can, but never take office unless it suits you." Mr. Disraeli went even further than the last motto. His belief was that the only hope of rallying the spirits of an Opposition long out of power was "to put them into office whenever you could and hold on as long as you could," and he was deeply grieved whenever Lord Derby declined his view. XII

Lord Salisbury, viewing the same set of circumstances, formed an exactly contrary opinion to that of Mr. Disraeli. The business of the Conservatives was to keep the Whigs in power in order that they might pursue a Tory policy. Vile combinations with the Radicals simply pushed the Whig into horrible Radical excesses. All this he expressed with a pointed pen in the *Quarterly*.

"To crush the Whigs by combining with the Radicals was the first and last maxim of Mr. Disraeli's Parliamentary tactics. His tactics were so various, so flexible, so shameless" that he had "the knack of enticing into the same lobby a happy family of proud old Tories and foaming Radicals." He records: "The humiliation of the Conservatives could not blind themselves to the fact that their leaders held office not because Conservatism was preferred by the House of Commons, but because the Radicals wished to punish the Whigs for not being Radical enough."

XII. Thus began an antagonism, long before the Reform struggle of 1867, which was destined to last in reality until Lord Beaconsfield's death—in spite of the Berlin Congress and the dual bestowal of the Garter.

The ordinary view, up till the publication of this Life, has been that 1867 was a tiff between a senior and junior Minister, started by a special disagreement and ended by a reconciliation. These volumes absolutely disprove this conception. Lord Beaconsfield indeed could afford to be, and was, generous. Throughout his life he was ready to fall on the younger man's neck, as he actually did at Hatfield. and cry, "Robert, how glad I am to see you." But "Robert" disapproved, disliked, and doubted "Dizzy" from start to finish. I think that in this matter the hated has the moral advantage over the hater. Lord Salisbury was a static Conservative; Lord Beaconsfield was an active one. The first was in favour of standing firm in the 'fifties and 'sixties in the hope that the nation would of its own volition return to the Conservative flag, the second was of opinion that all possible steps should be taken to encourage the party and arrange that this desirable object should be attained.

None the less, Lord Salisbury showed no more independent activity in the House than was compatible with the approval of Lord Exeter, who owned his borough of Stamford, or the custom of the time. When his father rebuked him for his Press articles against his leader he got the best of the argument—chiefly on the ground that if that father would not give him

more than £100 a year a married man had to live. So great was the ability he displayed in the Commons that when the Derby-Disraeli Administration of 1866–1867 was returned to power he was immediately designated for the India Office. The unkind suggested that that office was known in the Ministry as the "padded room." But no one could deny that the new Secretary immediately showed a vigorous grasp in dealing with the affairs of his office.

Unfortunately the Ministry, like its evanescent predecessors, was dependent for office on the disunity of its foes. Reform was the canker apparently bound to destroy it—and Lord Salisbury held as firm views on electoral reform as any one else in the Ministry. This is not perhaps to say much.

It would be as easy to explain the sonnets of Shakespeare as to unravel the tangle of reform policies between 1831 and 1867. The Whigs said the settlement of 1831 was final: their Radical allies soon began to say it was not. Liberals hedging between the two continued to introduce small reforms, all of which inevitably failed, and finished in Mr. Gladstone's *débâcle* in 1866—when the Whig cave threw him and his Bill downstairs together.

The Tory standpoint towards reform is stated with the utmost fairness in these pages—except that it does not go back far enough. At the beginning of the nineteenth century there were two theories, which may be briefly described as the Right to Vote and the Balance of Interest. The first was called "democracy"—a horrible

XII. word to our forefathers both in the American Republic and in the United Kingdom. The second was called constitutionalism, and appealed equally to old Whigs and Tories. Unfortunately, in 1827, when Peel and the Duke of Wellington had a chance of passing a real Reform Bill, since the old system, as Pitt had foreseen forty years before, was doomed, they chose instead to break their party up over Catholic emancipation. The Whig Reform Bill of 1832 was therefore passed, and in the hurry and excitement of the moment the Whigs enacted a franchise based, in spite of its inequalities, on pure numbers. *Vestigia nulla retrorsum*—the country was committed to democracy. The Tories and some Whigs still clung to the idea that plural voting, based on money or education, could still be made to counterbalance the inevitable downward extension of the property qualification for voting. But the plan was impracticable once the first step in the opposite direction had been taken.

Disraeli and Derby, much against their will, recognised this, and preferred the more expedient course of passing a moderate Democratic Bill of their own to being rolled in the mud for no useful purpose. Lord Salisbury took the contrary view and resigned from the Government. Much might be said on either side. But what is surprising is this. Lord Derby not only approved but led the way to this decision; as the correspondence in the *Life of Disraeli* amply proves; the whole party, with a few dissentients, agreed. Why did Lord Salisbury fix his vendetta on Disraeli alone? Why did he for years after in his private corre-

spondence refuse to refer to him in any other terms except "that single person" who prevented him being reconciled with his party? XII

These matters lie deep in the recesses of temperament. Disraeli could not abide Peel, and Salisbury could not endure Disraeli. But probably in both cases there was something more profound and less ignoble than a mere personal aversion. All these men felt instinctively that they stood for different conceptions of the future of their party—Peel for the Conservative Industrialism of the manufacturer; Disraeli for a Tory Democracy embracing all classes; and Salisbury for something which is older than either in history, the Toryism of the land.

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Lady Gwendolen Cecil's treatment of her massive subject-matter undoubtedly grows upon one in the course of reading. The effect of a treatment which is both detached and penetrating is cumulative. And suddenly one realises that the figure on the canvas, hitherto nebulous and a little elusive, is assuming the precision of a finished portrait.

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The death of the second Marquess did not leave Lord Salisbury long in the House of Commons after the catastrophe of 1867. It was long enough, however, to allow him to state that one amendment of his ex-leader "was too clever by half," or to suggest in another case "that the pea was not always under the same thimble." In attack his phraseology, usually described as ironic, was not devoid of a bitterness which was almost savage.

XII. When an unfortunate Irish Secretary had become involved in some statistics about the simultaneous increase of emigration and live-stock, in order to prove that special relief was not needed in Ireland, Lord Salisbury suggested that "he was looking forward to a period more peaceable for himself when it would be sheep and not Irishmen over whom he had to rule." When Gladstone lost his Reform Bill of 1866 by too much bullying the comment was, "Imperious language can only be justified by the obsequiousness with which it is obeyed." Nor is the acid diluted in the written word, where Lord John Russell suffers for his foreign policy: "Fresh from the bombardment of Kagosima he extols the virtues of Christian moderation."

It appears to me that the biographer underestimates the permanent value and popularity of the *Collected Essays*. The reviews of the foreign policy of the 'sixties will always live owing to their intensive knowledge and their poignant and lively style.

In the House of Lords the new Marquess acted in general with the front Conservative bench, but the Upper Chamber by no means cured him either of his independency of view or of his habit of what, in the more charitable years of his existence, used to be called "thinking aloud." It is probable that a good deal of this mordancy of phrase and of so-called indiscretion can be accounted for by the very extraordinary method by which he prepared his speeches. All politicians have their own system of preparation. Disraeli and Lord Randolph Churchill learnt their

great popular speeches by heart and recited them verbatim without notes. Mr. Gladstone wrote out the transitions between topics and the classic quotation which graced the peroration. Most men write down a few rough headings or memorise a few striking phrases. Lord Salisbury, on the contrary, we are told, never made a note and never conceived a phrase in advance. He brooded deeply over his subject, sometimes for days, and delivered himself of the accumulated result, slowly, pausing for the right word until it came. The proceeding must have required great nerve, but the biting phrase was absolutely unpremeditated—otherwise it might never have been uttered. It was the spontaneous outburst of an ironic personality. XII.

As to the form, Lord Rosebery has described "that deep voice rolling out sentence after sentence of polished rhetoric as though the wells of eloquence would never run dry." His most notable speeches in the Lords in 1869 were devoted to the powers and constitution of that body—a subject not devoid of interest to-day.

On the question of powers he was a "die-hard": "If it be true that the House of Lords is a mere copying machine for the decrees of the House of Commons, the sooner its duties are remitted to that useful instrument the better." One can imagine the inflection on the word "useful." He was, however, in favour of an increase in nominated life-peers. "We want, if possible, more representatives of diverse views, and more antagonism," and then, with a final

XII. sentence which contains the quintessence of Salisburian humour and wisdom, "I believe that the effects of this Bill will be small, and I like it the better for this."

Lord Salisbury did not suffer any of the penalties which usually await successful or unsuccessful revolters for his performance over the Reform Bill of 1867. His motives had been obviously sincere, and many a Conservative cherished a sneaking sympathy for his vigorous protest. But in any case Mr. Gladstone was re-creating his fortunes. When that wonderful old man, Lord Palmerston, died, game to the last to eat five courses at dinner with a slice of ham added, Mr. Gladstone seized the helm and steered the Whig ship right into the embracing waters of Radicalism. Now was the time for all good Conservatives to rally to the party irrespective of past differences, and Lord Salisbury rallied with the best in the defence of Church and State.

The magic of Disraeli prevailed over the magic of Mr. Gladstone in the election of 1874, and the Conservative Party was returned with an immense majority. Where did Lord Salisbury stand? It is an immense tribute to his personality that men all over the country debated this question. He had said that the result of the Reform Bill of 1867 would be that "the rich would pay all the taxes and the poor would make all the laws." He had cursed his party leaders, including the new Prime Minister, with bell, book, and candle. All his immediate judgments had been falsified. The Tory working man whom

Disraeli had tried to enlist in his hot youthful days of the early nineteenth century had rallied to that great intellect already sloping to its decline. Lord Salisbury had proved demonstrably wrong in the electioneering results of 1867. XII.

A Cabinet might well have been formed without him. But Disraeli was always generous in his appreciation of intellect. The two men chased each other all over London and Hertfordshire till the final compromise was arranged. Disraeli has already told how he drove twice up to Lord Salisbury's door in a hansom and back before he could nerve himself to the interview. This volume puts a far graver interpretation on something which in its essence might appear simply ridiculous. We now see that Lord Salisbury distrusted Lord Beaconsfield by one of those antipathies which are beyond explanation. The pressure of events, of private friends, of patriotism forced him to accept office, and so ultimately the succession to the leadership of the Tory Party and the guidance of the State. But, after all, Lord Beaconsfield was not a moral leper; he was a far greater statesman, or had at least a wider intellect than Lord Salisbury, and this secret repugnance does no credit to the younger man. Later in life Salisbury himself, when the full responsibility of leadership was on him, had to come to more than one accommodation with Lord Randolph Churchill or Mr. Chamberlain which was distasteful to him in principle—so that he cannot pose before history as that impossible person, the political Simon Pure.

Indeed, the biographer admits very frankly

XII. that the crash of 1867 was a lesson to him by which he profited. Henceforward, whenever a political view or move was suggested to him, he was not content to test it merely by theoretic conceptions of principle, but asked first of all, "Is it practicable?" It was a steady mental advance in this direction which made him the great party leader he ultimately became.

From 1874 to 1880 his life, first as Secretary of State for India and later for Foreign Affairs, becomes part of the history of the last great Disraeli Government. As an administrator he was an undoubted success, though, like many but not all great men, he was a bad hand at devolving his work to his deputies. It is pathetic to think of the Foreign Secretary corresponding with each and all of his Ambassadors in his own hand—just as years afterwards he made copies of his reply to Randolph's letter of resignation for every single member of his Cabinet. It is doubtful whether even Mr. Gladstone excelled him in sheer capacity for hard work. Lord Beaconsfield did not share Lord Salisbury's admiration for our Ambassadors. He always referred to the British Ambassador to the German Court as "our goosey-gander at Berlin."

But a consideration of these six years of life would involve me in an entire defence or criticism of the Asiatic and European policy of the Ministry of which Lord Salisbury was the second most important member. Space obviously forbids.

Indeed, if I may venture on a criticism, it is that a disproportionate amount of space is devoted

to the Eastern crisis of 1876–78. As far as I can see, the letters, while showing in a clearer perspective the excellent work Lord Salisbury did, contribute nothing new. Perhaps the war has made us all unduly weary of diplomatic tangles. The guns have cannonaded the whole Victorian façade of Austrian, Russian, and German diplomacy into political rubble. The Constantinople problem of the 'seventies is as interesting to us as that which faced the Byzantine Emperors. XII

This is no criticism on our Foreign Office of the day. Loose talk about "backing the wrong horse" or the failure of the Berlin Congress is very often nonsense. A diplomatist is not a prophet; he may be content if he averts a pressing danger and sees his work endure a few years. And the British delegates to the Berlin Congress achieved so much at least.

In the last few years of the Ministry the Foreign Secretary came into closer accord with his chief. He was surprised to discover that the Prime Minister could be honest. The Premier responded cordially with praise of Lord Salisbury's moral courage.

But yet to the very end the note of criticism is there. The two men did not disagree on Imperial and foreign policy. But the junior did not agree with the senior's presentation of the case, nor did he believe that the policy would prove a good electioneering cry. The first criticism was a matter of taste. The Corinthian canon of Hatfield conflicted with the more florid Oriental style. On the second point the critic

XII. might have proved wrong had the Premier dissolved in 1878, but by underestimating his adversaries he over-stayed his market. So for the moment we take leave of Lord Salisbury in the hour of defeat pondering gloomily on the instability of a foreign policy based on the variations of democratic control.

What is the type of the intellectual character and for what does that character stand in the politics of the later nineteenth century? On the first point I prefer the judgment of the biographer, who knew Lord Salisbury intimately and yet preserves a dispassionate tone, to any opinion I could form, who did not know him:

"Without any apparent effort or interval of transition he passes straight from the thickest dust of battle into an atmosphere of contemplative reflection, in which he surveys the subject as it were from a distance and in all the circumstances of its origin and environment. This gift followed him into the fields of counsel and administration, enabling him throughout his career to concentrate his judgement at any given moment upon the issue in debate with an impersonal coolness wholly unaffected by the excitement of conflict, national or political, which surrounded it at the time, and in which he himself was perhaps taking a leading part." In a word, that rare product, the fighting philosopher!

It is too early to appraise his ultimate place in history. He fought or consorted with two greater figures in Gladstone and Disraeli, but he survived them both, and ultimately held the stage. Some may dispute the pre-eminence I

give Disraeli over him. I would defend myself by quoting what was no doubt Lord Salisbury's ultimate view on the Disraelian "betrayal" of '67: XII.

"His [Disraeli's] mind did not work that way. The English nation would lose none of its essential characteristics because this or that set of men were not admitted to the polling-booth. Its natural leaders would still remain its natural leaders; and it had always been his contention that the extent and limitation of their authority must depend in the main on their own conduct, and certainly would not be affected by any numerical changes in the machinery incidental to representative institutions."

Such changes might tell in favour of one party or the other—in this case probably the Conservative one; principle was not involved at all. So thought Disraeli, brooding over a century or two.

But Lord Salisbury was thinking about nothing of the sort. He stood for certain definite mid-Victorian ideas—property and aristocracy *versus* the mob. "The rich would pay all the taxes and the poor would make all the laws." He had a right perhaps to expect that the rich Whigs and the country squires would stand behind him. But, looking back now down the vista of over half a century, we see that in the broad view Disraeli's judgment was secular and Lord Salisbury's morality the fashion or interest of a day. Disraeli's view has been justified by the event, because he saw deeper into the nature of the people. Romance triumphed over logic, and for

XII. this reason the elder statesman was the greater intelligence. Perhaps if the two men met and discussed the matter in the Elysian fields the argument would be brisk, but the conclusion, I think, would be the same.

XIII

THE LATE SIR SAMUEL EVANS

Samuel Evans was born in 1859. He was, and was proud to be, of humble origin. Through many difficulties he made his way to the Middle Temple, by which Society he was called to the Bar in 1891. He was granted the Patent of Queen's Counsel after little less than ten years' practice at the Bar. He became a Bencher and Trustee of the Middle Temple in 1908, and in the same year was made Solicitor-General, holding that office until the year 1910, when he became President of the Probate, Divorce, and Admiralty Division. He was greatly assisted in his career by the unswerving fidelity shown to him by a stalwart Liberal constituency, the Mid-Division of Glamorganshire, which he represented in Parliament from the year 1890 to 1910.

Such in the briefest outline was the career of a very remarkable man. Its record of achievement was distinguished, but if anything it lagged behind the measure of his real powers: or it would at least have appeared so to those who knew him best had not the Great War afforded him an opportunity so singular.

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Samuel Evans began his legal career, as many an aspiring young Welshman had done before him, in what is conventionally but not disrespectfully called the lower branch of the legal profession. But he was ambitious and discerned no kingdom worth the conquering in the small legal activities of a provincial centre. And so, saving what he could, he decided to take the venture which many had dared before him, and entered upon his studies for the Bar. The indulgence of the Inns of Court has rendered the transition very easy in all but its financial aspect. Evans as a young man was merry, humorous, convivial, and sociable. He retained these qualities and added to them until the period of his last illness, and I remember his describing to me in glowing language the new world which was opened to him by the social and legal camaraderie of the Middle Temple. To the day of his death he was a devoted member of this Society. He never became Treasurer of it, for one hardly can unless length of days beyond the ordinary span is conceded. But he lunched there every day when his Court was sitting; and on occasions when its hospitable doors were thrown open to guests he was the life and soul of every company.

His career at the Bar and in Parliament began almost simultaneously. In the House of Commons he did not enjoy at first equality of opportunity with his contemporaries. Work at the Bar came, indeed, but it was for some time trivial, unremunerative, and tiresome, involving constant journeys to Welsh County Courts. None the

less it became recognised gradually, but quite plainly, that the obscure practitioner climbing laboriously at so low a rung of the professional ladder was a Parliamentarian of very unusual gifts. I am not here concerned with this aspect, remarkable as it was, of his career, and, therefore, all that I propose to say under this head may be said in this place. He was in debate humorous, resourceful, well-informed, and indomitable. For many years he and the present Prime Minister bore the burden and won the principal glory of the unofficial opposition to the Unionist Party. Nor was it found easy as between the two men, for the years I have in my mind, to decide which was destined to the greater Parliamentary career. Had Evans been in a position to devote himself to that hard taskmistress, politics, it would have been difficult to rule out any prospect, however dazzling, as the goal of his ambition. Nor were his gifts confined to the purposes of opposition. He was Solicitor-General for three years during a tempestuous period in domestic politics. Many most difficult Parliamentary tasks were placed upon him. He was equal, and more than equal, to them all. He was always resourceful, always imperturbable, always the master of his subject, and always light in hand. I have not known in the sixteen years in which I have been in Parliament a Law Officer whom, were I Prime Minister, I should more confidently appoint to confront a period of parliamentary storm. XIII.

His professional advancement hardly marched equally with his political fortunes. It is true that he acquired and rapidly acquired, a busy

XIII. junior practice, but it was entirely local in its origin: its range, emoluments, and importance were not considerable: and it was never of the kind which gradually brings a provincial barrister into contact with those great London solicitors whose nods make men or break them. But a busy practice of the kind indicated, with perpetually recurrent railway journeys, often undertaken by night, is one of the most exhausting forms of work at the Bar. Evans made up his mind, though not without some natural anxiety, that he could no longer support both his work in Parliament and the growing exactions of the practice of a local junior. And accordingly we find him in 1901 applying for a silk gown, after less than ten years' practice at the Bar. His application was successful, and his name duly appeared in the list as the youngest in standing of all to whom the new dignity had been granted.

He lost on balance no professional income by his promotion, but he did not gain as much as those who knew his real powers expected. It is true that he soon forged his way into the front rank of the leaders of the South Wales Circuit. But the theatre in which his talents should have found an early and a generous recognition—the Law Courts in the Strand—almost seemed neither to have heard of him nor to wish to hear of him. It is no doubt true that he did not give because he could not afford to give, himself a real chance there. All his life he had to take work where it was offered to him. Such work, now become considerable, constantly awaited him on Circuit. He could not afford to refuse it in the hope,

fugitive and uncertain, that it would be replaced by the substitution of a London practice. And so he continued to present the appearance of a parliamentarian, possessing many gifts of the most brilliant and striking order, whose effectiveness was plainly diminished by recurrent absence and by pre-occupations which in perspective were trivial. XIII.

I have spoken already of his Parliamentary work as Solicitor-General. It is only necessary to add that as soon as he was brought continually as Law Officer into the Law Courts in London he established his claim to be counted among the shrewdest and most telling of the advocates of the day. Occasionally political prejudice marred the effect of his advocacy and exaggerated a slight uncouthness which he never quite banished from his professional manner. Thus his handling of the famous Swansea Education case in the Divisional Court was among the least happy of his professional performances. But no one could be with Evans, just as no one could be against him—and I was often both—without realising that he was completely master of the craft. He never missed a good point. He never dwelt upon a bad one. And he was richly equipped with all the legitimate arts and devices by which the great advocates recommend their case and disparage that of their opponent.

After three years as Solicitor-General he began to entertain some anxiety as to the future of Mr. Asquith's Government and the effect which its disappearance might produce upon his own fortunes. I was myself—and I told him so at the time—quite confident that he had made his

XIII. legal reputation in London so decisively that he might put behind him for ever the nightmare of the railway journeys of provincial work. But for a man by disposition bold and even assertive he was singularly modest on the subject of his own position and prospects. He was doubtful —absurd as the apprehension seemed to his friends—whether he would be able to command the minimum fee which custom prescribes as appropriate in the case of one who has been a Law Officer of the Crown. Other influences conspired to make their impression felt. Mr. Asquith at that time was anxious to offer promotion to the present Viceroy of India, and he accordingly pressed his Solicitor-General to accept the Presidency then vacant of the Probate, Divorce, and Admiralty Division, assuring him at the same time that he did not contemplate this employment, distinguished though it was, as the climax of the new President's judicial career.

The combined forces of these various considerations prevailed, and in 1910 the new President took his seat for the first time. It would be idle to pretend that the appointment was received with special enthusiasm by the legal profession, taken as a whole, and in some quarters the impression created was stated in a manner neither discreet nor reticent. It was complained that the new President hardly knew one end of a ship from another, and was completely ignorant of the manifold refinements and peculiarities of maritime law. In a very brief space those who had disparaged his professional ability were involved in much public absurdity.

With characteristic ardour he began to prepare for his new labours by mastering every standard work which illustrated the subject, by spending all his vacations on sea voyages, and generally by an onslaught, alike reckless and ruthless, upon these mysteries which pedants sometimes inform us take so many decades to master. And so in a few months the new President, already generally admitted to be admirably equipped for the purpose of Probate and Divorce work, became recognised as a shrewd, informed, and very competent Admiralty Judge. Had he died in the early part of 1914 it would hardly have been possible, even for a pen as friendly as mine, to paint in warmer or more laudatory language the achievement of a busy life. But with the outbreak of the European War in August responsibilities staggering in their complexity and novelty were thrust upon him. It may be doubted whether at that time the President, who was not accustomed to fritter away his leisure, had ever even opened a volume on the subject of international law. It is ironical to recall that persons in high authority took so serious a view of the situation that suggestions were gravely made to the President that he should consent to delegate the Prize work to some solid and learned Judge who was to be assigned to his Division for that purpose. He waived aside this suggestion with manly and self-confident indignation. His measures to equip himself for his new duties were not lacking in energy, thoroughness, or decision. He spent a large sum of money on the purchase of a library on international law. He flung himself into its

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XIII. study with a devotion and industry which have hardly ever been exceeded by any English Judge. And, indeed, the task was one of extreme difficulty. It was not merely that of mastering the doctrines of international law in all their ramifications. It was not, to take a special illustration, merely that of acquiring familiarity with the great intellectual structure which the vigorous understanding of Lord Stowell had contributed to the maritime jurisprudence of the world; the task which fell upon Sir Samuel Evans was immeasurably greater. It was not only necessary for him to know and understand all that had been said and all that had been done; it was necessary that he in his turn, taking the torch from Stowell's hands, should make an intellectual contribution to the development of the science hardly less remarkable than that of his accomplished predecessor. The whole field of international law had been transformed since the Napoleonic War, and in particular the development of steam, electricity, cables, and of the character of modern weapons had rendered obsolete much of the learning which illustrated Lord Stowell's principles; and in many cases made it necessary to pursue those principles to their first origin and, when established, to restate and adapt them. In the discharge of this stupendous task the President displayed extraordinary mental qualities. He proved himself not only a great Prize Judge but a very great Prize Judge. The volumes which contain his judgments will be hereafter valued alike as a treasure-house of learning, and as an example

of trenchant reasoning and lucid exposition. Most of the great cases which came before him produced a jungle of baffling and repulsive detail Immense bundles of documents as high as his desk were brought before him week by week. Never did his patience falter, his grasp weaken, or his memory fail. It happened in almost every great case that he himself suggested some new, relevant, and unobserved point which had entirely escaped the observation of the experienced solicitor and Counsel before him. The task of a Judge of first instance is always in one way more difficult than that of a court of appeal. The matters presented to him never appear in so clear and succinct a form. Each hearing clarifies the issue; and by doing so reduces alike the area of controversy and the material to be mastered. Especially was this true of the President's work. Stacks of ill-arranged and ill-digested documents were habitually flung at his head in matters peremptorily requiring an immediate decision, which months later, if they became the subject of appeal, would be found collected before the Judicial Committee of the Privy Council in a neatly arranged printed volume. In spite of these difficulties Sir Samuel Evans's reputation grew more and more; and the occasions on which the Judicial Committee interfered with his decisions were extraordinarily few. And it is certainly true that on more than one of these few occasions of divergence persons very highly qualified to form an opinion respectfully preferred the conclusion of the President.

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XIII.

I think it worth while to insert in this place some characteristic illustrations of his judicial method at this period of his career. And before I do so I would recommend some young barrister, who has given attention to the subject of international law, to consider whether a volume entitled *The Judgments of Sir Samuel Evans in Prize*, consisting not merely of the judgments themselves but rather of an exposition of the President's conclusions and mode of reasoning, might not bring in a great return of public reputation. The extracts which follow are shortly set out, for they speak for themselves. I have interposed informally such bald comment as seems necessary to make the matter selected intelligible. This part of my essay is naturally intended, in the first place, for technical readers, but most laymen of general experience in affairs would, I think, derive profit and instruction from its consideration.

The "Corsican Prince"

1916, p. 195; 1 B. & C., 178.

This was a claim by the owners of a British ship for freight, expenses, and demurrage in respect of the carriage of a cargo of barley shipped before the war at Odessa and consigned to Hamburg; the cargo was seized in Prize; it was sold to avoid deterioration and the proceeds were paid into Court. Part of the proceeds were ordered to be released to a Russian bank, part to a French bank.

The shipowners entered a caveat against the release of the proceeds. The Russian bank took

steps with a view to having the shipowners' claim dealt with in the Commercial Court; the shipowners claimed in the Prize Court an order that the amount of their claim, to be assessed by the Registrar, should be paid out of the proceeds of the goods which were in Court. The practical ground of the dispute was that by the principles of Common Law no freight had been earned, the voyage not having been completed, while the Prize Court allowed compensation in certain cases in the nature of freight upon goods seized in Prize where the voyage had not been completed. The President decided that the Prize Court had exclusive jurisdiction over the matters in dispute. XIII.

Sir S. Evans in the course of his judgment said: "The matter which now arises for decision is whether the claim of the shipowners, and the questions as to the rights of the shipowners and the cargo owners in respect of the proceeds, are to be determined in a Common Law Court in the King's Bench Division or the Prize proceedings in this Division.

"The subject is one of general importance affecting our judicature, and I propose, in the first place, to deal with it upon lines applicable to proceedings of this nature generally; and then to state the particular facts of this case to which the principle and practice governing such cases have to be applied.

"Counsel for the shipowners in their argument cited many authorities for the proposition that this Court, exercising its Prize jurisdiction, had the exclusive right to determine such questions

XIII. as those in issue, and not a Common Law Court; and that such determination should be in accordance with the Prize Law. It has been my duty to examine those authorities and others throwing light upon the subject. Having done this, it does not appear to me to be necessary or useful to go through the cases in detail, because the examination of them shows that the results which are summarised in text-books of various authors—themselves authorities of acknowledged renown—are abundantly justified by the decided cases."

He then referred to Story on the Principles and Practice of Prize Courts; the decision of Story J. in Maisonnaire *v.* Keating (1815), 2 Gall. 325; Kent's *Commentaries on American Law*; The "Siren" (1868), 7 Wall, 152; Halleck's *International Law*; Le Caux *v.* Eden, 2 Douglas, 594; Faith *v.* Pearson, 4 Campb., 357.

"The Prize Court has constantly dealt with claims for freight and damages where ships or cargoes have been captured or seized, not only as between captors and owners, but also as between owners of ships and owners of cargo, and has adjudicated upon such claims whether the ship or cargo has been released and when both ship and cargo has been released; and apparently no action involving questions in similar cases were brought in any Common Law Court.

"And this is obviously for grounds solid in justice and convenient in practice, because the two Courts administered two different codes or systems of law; the Prize Courts deal with claims in accordance with the Law of Nations,

and upon equitable principles freed from contracts, which almost always cease to have effect upon capture or seizure, by reason of the non-appearance or non-completion of the contract of affreightment; whereas Common Law Courts would only determine the consequences of the strictly legal contractual obligations of the parties. The King's Bench Courts would either give the claimants for freight the whole or nothing, according to whether the contract of affreightment had been performed or not. But the Prize Court takes all the circumstances into consideration, and may award, as it has done in decided cases, the whole or a moiety of the freight, or a sum *pro rata itineris*; or it may discard the contract rate altogether, even as a basis for assessment or calculation—*vide* the 'Twilling Riget,' 5 C. Rob., 82; or it may withhold or diminish the sum by reason of misconduct—as, for example, resistance to search, or spoliation. XIII.

"And we find that in accordance with the principles, precedents, and practice which have established the exclusive jurisdiction of the old High Court of Admiralty, to which the Admiralty Division of this Court has succeeded when sitting as a Prize Court, the Prize Court Rules have been framed for this Court, and have been made by the Privy Council under the Prize Court Act, 1894, and not by the Rule Committee which framed the Rules for the High Court. It is not necessary to refer further to these rules, but attention may be directed to Order XLV., which provides that in the absence of prescribed rules the practice of the late High Court of Admiralty

XIII. in Prize Proceedings shall be followed, or such other practice as the President of this Division may direct. It may also be noted that the appeal from decisions of this Court on all questions, claims for freights included, is to the Judicial Committee of the Privy Council; whereas, if similar questions could be tried in the Commercial Court or any Court of the King's Bench Division, the appeal would be to the Court of Appeal or to the House of Lords.

"This Court has also its special officers, like the Registrar and Merchants and the Admiralty Marshal, and its special machinery for dealing with all such matters as may arise in prize proceedings.

"I have dealt with the important question of jurisdiction generally. But in truth, counsel for the claimants did not dispute the main propositions which have been stated; but contended, as I understood, that where, as in this case, the captors or the Crown after seizure released the goods, not only had the King's Bench Courts jurisdiction to deal with the claim for freight, but that they alone had the jurisdiction to the exclusion of this Court, even when the proceeds of the cargo seized and sold are now in the hands of this Court. This contention is, in my view, quite unsound. A somewhat similar argument was put forward in Le Caux *v.* Eden (2 Dougl., 594) on the ground that the ship had been declared by the sentence of the Prize Court to be no prize; but it did not prevail. As I have before pointed out, the Prize Court exercised jurisdiction and exclusive jurisdiction, where the subject-matter

had been acquitted or released, and it had been held that such jurisdiction was vested in it, even when captures had been abandoned without any proceedings having been instituted at all." XIII.

He gave directions, therefore, that the claim of the shipowners and all questions between them and the Russian Bank and the French Company be heard in Prize proceedings.

The "Marie Glaeser"

1914, p. 218; 1 B. & C., 38, 11. Sept. 16, 1914.

Note.—The Prize Court sat for the first time on the 5th September 1914, the war having broken out on the 4th August. This case is interesting amongst other things as showing the grasp and width of knowledge which Sir Samuel Evans had acquired of Prize Law at that early date.

This was a claim for the condemnation of a German ship seized at sea on August 5, 1914. Appearances were entered (*a*) on behalf of a German Company which owned the ship who claimed the vessel; (*b*) on behalf of English shareholders in the German Company; (*c*) by Dutch mortgagees; (*d*) by other claimants in respect of disbursements and necessaries.

It was held that, the VIth Hague Convention not protecting the vessel, she must be condemned.

Sir Samuel Evans then dealt with the claims (*a*) of the owners.

He found that the affidavit in support of their claim to appear was insufficient; the rules required an affidavit not merely showing the contentions of the claimants but facts which in the special circumstances will entitle them to come to the

XIII. Court to enter an appearance. He quoted from Dr. Lushington in the "Pana ja Drapaniotisa," Spinks, 336, the following passage: "The principle is this: That to support a claim in the Prize Court the individual asserting his claim must first show that he is entitled to a *locus standi*. No person to whom the character of enemy attaches can have such a claim, save by the express authority of the Crown; therefore, to prevent deception, which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral states resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims.

"Certain forms of affidavit, which were then in use, are set out in the judgment in that case, and though those forms of affidavit are no longer in use in this country, the affidavits which lead to the filing or the entering of an appearance in prize cases in this Court ought to conform to the substance of the affidavits which were in vogue in 1856. They ought to state clearly what the position of the owner of the vessel is, what his nationality is; and, if it appears that he is an alien enemy, in the ordinary course the circumstances ought to be stated in the affidavit, showing upon what grounds he claims to be standing in some character other than that of an alien enemy for the purpose of being heard in this Court."

He then referred to the "Felicity," 2 Dodson, 381 (Ld. Stowell); the "Troija," 1 Spinks, 342;

The "Hoop," 1 C. Rob., 196 and 209; Story, *Principles and Practice of Prize Courts.*

He continued: "In this case there is nothing in the affidavit which tends to show that the hostile character of the owners of the vessel is suspended in any way, nor is there any suggestion made by those who claim to appear that there is anything in the nature of a licence to trade, or any circumstances whatever differentiating this alien enemy from any other enemy who might be affected by the judgment of the Prize Court. Therefore, on the ground of the insufficiency of the affidavit, and on the ground that there are no special circumstances which can be shown to entitle the enemy to appear, I hold that the appearance ought not to stand, and it will be struck out."

He disallowed the claims of the British shareholders and those in respect of disbursements and necessaries, and reserved the claim of the mortgagees for further argument.

On the 16th Sept. 1914, Sir Samuel Evans delivered an exhaustive judgment dismissing the claim.

The contentions of Counsel for the mortgagees are thus stated by the President:

"First, that no case in the English Prize Court had dealt with the claim of a neutral mortgagee in a sense adverse to the claim now put forward; secondly, that the decisions in our Prize Courts touching liens—for instance the 'Tobago,' 5 C. Rob., 218; 1 Eng. P.C., 456—were not applicable to the cases of mortgages, on the ground that some kind of 'property'

XIII. in the ship passed to and vested in mortgagees; and thirdly, that in any event at the present day the International Law of Prize should be extended and applied so as to protect mortgages held by neutrals in accordance with what he contended was the policy and principle upon which the Declaration of Paris was founded."

The President then dealt with the terms of the mortgage. "With regard to the first two contentions of Counsel for the claimants, even if there were no decision of our Prize Courts dealing with the claim of a mortgagee, a principle ought to be deducible, and in truth can clearly be deduced, from cases dealing with liens upon, or claims in respect of, captured vessels, the application of which should be decisive of the case now before the Court.

"But it is not quite accurate to say that our Prize Courts have never adjudicated upon claims of a neutral mortgagee."

He cited the "Aina," (No. 1) Spinks, 8, where it was held that the claim of a neutral mortgagee of one-third of an enemy ship would not be entertained.

The President then dealt with the authorities generally. He referred at length to the "Tobago," 5 C. Rob., 218, where the claim was founded on a bottomry bond. (Lord Stowell.)

The "Ariel," II Moore P.C., 119. He found it difficult to see in what respects a claim under a mortgage differed from that on a bottomry bond so far as regards the functions of a Prize Court. He cited a number of authorities which established that by English law the claim of

a mortgagee ranked after claims in respect of bottomry, salvage, and wages. XIII.

As to the contention that the mortgagees had, by virtue of the mortgage, some kind of "property" in the ship, he referred to the Merchant Shipping Act, 1894, s. 34, which provided that a mortgagee of a ship would not by reason of the mortgage be deemed to be the owner of the ship, etc.

He refused to embark upon an enquiry as to whether the German law substantially differed from the English, or what the German law might be.

He then referred to the "Marianna," 6 C. Rob., 24, where Lord Stowell said: "Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties which can have no operation as to them. If such a rule did not exist it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them if such documents were liable to be overruled by liens which could not in any manner come to their knowledge. It would be equally impossible for the Court which has to decide upon the question of property to admit such considerations. The doctrine of liens depends very much upon the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims would require of the Court a perfect knowledge of the law of

XIII. covenant, and the application of that law in all countries, under all the diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions."

P. 53. The President then said: "The truth is that capture of enemy vessels at sea during war would be a hazardous and almost worthless right of belligerents, if the captors were confronted with such claims as are put forward in this case, or if mortgages gave to mortgagees prior rights to those of the captors."

He then dealt with the claim which Counsel "boldly pressed" that the Court should extend the law at the present day so as to protect neutral mortgages of enemy ships on the ground that the Law of Nations had advanced in this direction by and since the Declaration of Paris, 1856. He then glanced briefly at the way the Declaration of Paris had been dealt with by the nations, pointing out how that matter had been dealt with during the Crimean War; how the U.S.A. refused to become a party to it, but gave effect to those principles during the Civil War with Spain; that Spain, although maintaining that she was not bound by the Declaration, also gave orders for the observation of its rules; that Spain and Mexico, although they refrained for half a century from acceding to it, had recently formally acceded.

"This Court accordingly ought to, and will, regard the Declaration of Paris, not only in the light of rules binding in the conduct of war, but

as a recognised and acknowledged part of the Law of Nations, which alone is the law which this Court has to administer." XIII.

But how can it be used to support the claimants' case? It dealt with goods in ships.

He then dealt with the decisions of Prize Courts since 1856, which he pointed out were against the contention raised:

The "Hampton," 5 Wall., 372, where the claim of a mortgagee was disallowed; "Battle," 6 Wall., 498; "Der Turner," a case in the Prize Court of France where the claim of a neutral mortgagee to a German ship was disallowed; the "Carlos F. Roses," 177 U.S. Rep., 655, which was the case of a claimant who had advanced monies upon cargo and taken Bills of Lading; the "Nigretia," Takahashi, 551 (Claim for salvage); the "Russia," *ib.*, 55 (Claim for necessaries). 1866. 1867. 1870. 1900. 1905.

He also held that there was another broad ground upon which the claims could not succeed, namely, that the ship was sailing under the German flag, with papers entitling her to do so, and navigated by a German master in the commerce of the German Empire. He referred to a number of English authorities, also to Hall and Westlake.

He dismissed the claim.

The "Odessa"—The "Cape Corso"

1915, p. 52; 1 B. & C., 163.

Headnote

The Pledgees of bills of lading of enemy cargo, which has been properly captured, have no claim which is recognised in the Prize Court; and the

XIII. fact that the right to sell has accrued to the pledgees does not make the pledgees into owners.

P. 174. As to the argument presented, that side by side with the development of commercial dealings on the lines of those now presented there should be such an expansion of the law of Prize as would protect people who, like the claimants, lend money on the security of cargoes or their bills of lading, he said:

"At the outset, two things must be remembered: first, that this is a Court of law; and secondly, that the law to be administered here is the Law of Nations—that is, the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion.

"The decisions of a Court of Law should proceed upon defined principles. Those principles have to be applied to ever-varying sets of facts. But the Court has the function and duty not merely of deciding individual cases, but of determining them upon principles which shall be a guide to others as to what their positions and rights are in the eye of the law.

"In the domain of International Law, in particular, there is room for the extension of old doctrines, or the development of new principles, where there is, or is even likely to be, a general acceptance of such by civilised nations. Precedents down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted or cast aside."

Having referred to some of the authorities referred to in his judgment in the "Marie Glaeser," so far as the claims were founded upon the position of the claimants as pledgees and not legal owners they could not, in his judgment, be allowed. XIII.

He then dealt with the contention that the claimants had such a beneficial interest in the goods that their claims should be allowed.

He pointed out the difficulties that would arise, how the door would be open to all sorts of enquiries and calculations which had been closed by his predecessors and by Courts of Prize.

"That persons may be losers during war time in pecuniary or commercial transactions with enemy traders is only too obvious. Loss is no test of legal rights. The claimants have rights of action against their customers for their full claims, which they can set in motion either during the war or after it. How far they might be fruitful is no concern of this Court. 176, 7.

"In my judgment, the only safe guiding principle is to ascertain who are the legal owners of the cargoes; and, if the goods are found to be the property of neutrals or British subjects, to release them, as was done in the 'Miramichi' (*ante*, p. 137; (1915) p. 71)."

The "Möwe"

1915, p. 1; 1 B. & C., 60.

In this case the question arose as to whether the "Möwe," a German ship, had been captured at sea, and was liable to condemnation, or in port, and was only liable to detention under

XIII. Article 2 of the VIth Hague Convention of 1907. The question of the right of an alien enemy to appear in the Prize Court was dealt with. Sir Samuel Evans held that the future practice of the Prize Court should be that any alien enemy, claiming any protection, privilege, or relief under any such Convention as the Hague Convention, should be entitled to appear and argue his claim before the Court.

He held that, apart from that new practice, an enemy shipowner who alleges no suspension of his hostile character, had no right to appear and argue that his ship was protected from condemnation by the VIth Hague, Art. 2.

In his judgment he first dealt with the question of the right to appear; he referred to his judgment in the "Marie Glaeser" and the cases there cited. Also to the "Falcon," 6 C. Rob., 196; to the forms since the days of Sir James Marriott; to the forms in the Prize Court rules.

The principle upon which the Prize Court in the times of Lord Stowell and Dr. Lushington proceeded was that no one who was a subject of the enemy could be a claimant unless under special circumstances which discharged him from the character of an enemy, such as is given under a flag of truce, a cartel, a pass, or some other act of public authority that placed him under the King's Peace *pro hac vice*. Sir Samuel Evans referred to cases where an enemy had been allowed to appear to claim the benefit of the "days of grace" granted by Order in Council in the Crimean War; to similar cases in the Spanish-American War and in the Russo-Japanese War.

He was satisfied that Lord Stowell and Dr. Lushington in their day would not have allowed the enemy owner to appear and assert a claim under Article 2 of the VIth Hague; there was no coming *pro hac vice* within the King's Peace; there was no suspension of the hostile character. XIII.

He then indicated that in his view the VIth Hague was not binding because all the belligerents had not ratified it. He expressed the opinion that "it would be in accord with the traditions of this country if such steps were taken as may be necessary to make operative a series of Conventions solemnly agreed upon by the plenipotentiaries of forty-five States or Powers after most careful deliberation, with the most beneficent international subjects." P. 70.

"Dealing with the Convention as a whole, the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise.

"Mr. Holland argued that this is a matter not of International Law, but of the practice of this Court. That view is correct. I think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned." He also referred to O. XLV. of the Prize Court Rules. "The practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars 72, 3.

XIII. as the present, it behoves a Court of Justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects. In times of peace the Admiralty Courts of this realm are appealed to by people of all nationalities who engage in commerce upon the sea, with a confidence that right will be done. So in the unhappy and dire times of war the Court of Prize as a Court of Justice will, it is hoped, show that it holds evenly the scales between friend, neutral, and foe.

"A merchant who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn Conventions dealing with the state of war, like those formulated at the Hague in 1907, he should have the benefit of the provisions of such international compacts. He might equally naturally expect that he would be heard in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position. It is to be remembered also that, in the international commerce of our day, the ramifications of the shipping business are manifold, and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if, through an owner (though he be an enemy) the case for a seized or captured vessel were permitted to be independently placed before the Court.

"For the considerations to which I have adverted and in order to induce and justify a conviction of fairness, as well as to promote just and right decisions, I deem it fitting, pursuant to powers which I think the Court possesses, to direct that the practice of the Court shall be that whenever an alien enemy conceived that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court. The grounds of his claim should be stated in the affidavit to lead to appearance which is required to be filled by Order III. Rule 5, of the Prize Court Rules, 1914." XIII.

THE "ROUMANIAN"

1915, p. 26; 1 B. & C., 75.

The question in this case was whether a cargo of oil which had been discharged into tanks at Purfleet was subject to seizure as Prize.

The judgment contains an interesting examination of the jurisdiction of the Prize Court; the distinction between seizure at sea and on land. It is distinguished by much learning.

It cannot, however, be conveniently condensed.

THE "ZAMORA"

1916, p. 27; 1 B. & C., 309.

Summons by the Procurator-General under O. XXIX. of the Prize Court Rules as amended by Order in Council of the 29th April 1915, that the War Department be at liberty to requisition 400 tons of copper said to belong to neutrals.

The claimants contended that the substantive

XIII. law administered by the Prize Court could not be changed by the exercise of the Royal Prerogative; that the Act of Parliament which authorised the making of rules as to practice and procedure did not authorise the making of changes in the substantive law; that the Law of Nations did not recognise any such right to compulsory purchase of neutral property as was claimed by the Crown.

The claimants in substance contended that the Crown had no power by the O. in C. of the 29th April 1915, to alter the substantive law administered by the Prize Court so as to enable the Court to make an order for the requisition of neutral property brought in as Prize.

319. Sir Samuel Evans was clearly of opinion that he had jurisdiction to make the order asked for, and that O. in C. was a valid order and he made the order prayed forthwith; on a subsequent date he delivered judgment at length.

He said: "The Court has inherent powers to deal with the property brought within its jurisdiction apart from any rule; it has power to order the sale of perishable goods, etc. In my view persons who lay claim to property captured or seized have no right by any rule of I.L. to demand that the property should be preserved in specie until the final decree determines whether it is to be released or to be condemned. Prize Courts have always acted on the principle that the capture is lawful until claimants established the contrary.

"If the claimants have no legal right to have the property delivered up in specie, it matters

not whether the property is sold for good reasons, and so converted into money, or is requisitioned by the Crown (instead of going through the form of sale) upon an undertaking to pay the appraised value into Court.

"In my view the Order in Council deals only with a matter affecting the practice and procedure of the Court. If so it had the force of an Act of Parliament. If it went beyond practice and procedure it had the force of an Order in Council."

It was within the power and prerogative of the Crown to make an order giving the right to requisition neutral property which might be of use to the Crown as a belligerent. He referred to a number of cases in Hay and Marriott's Reports and to the "Haabet," 2 C. Rob., 174, where Lord Stowell dealt with the right of a belligerent to take possession of foodstuffs.

As to the contention that to give effect to such an Order in Council was to act in violation of the Law of Nations, he referred to the decisions of other countries,—the "St. Lawrence and Cargo," 2 Gall., 19, and other American decisions, including the "Memphis and Cargo," Blatchford, 202.

In view of these cases it could not, in his opinion, be possible to maintain that the requisition by the State of captured property which was provided for by O. XXIX. was a violation of an acknowledged or settled principle of rule of the Law of Nations.

It was not, therefore, in his opinion, necessary to enquire whether the Prize Court was bound to obey an Order in Council which might run contrary

XIII. to the acknowledged Law of Nations. "If that question should arise, I am humbly content to assume the standpoint of Lord Stowell in the case of 'Fox,' Edw., 312, in which he had to deal with the Orders in Council which were given by way of reprisal after the celebrated Berlin and Milan decrees of Napoleon."

He quoted from the judgment at length.

He referred to the judgment of Story J. in Maisonnaire *v.* Keating; to the judgment of
331. Betts J. in the "Nassau," Blatchford, 198: "I make bold to express the hope and belief that the nations of the world need not be apprehensive that Orders in Council will emanate from the Government of this country in such violation of acknowledged Law of Nations as to make it conceivable that our prize tribunals, holding the Law of Nations in reverence, would feel called upon to disregard and refuse obedience to the provisions of such Orders." I have elsewhere indicated my own individual preference for the President's treatment of this delicate issue to that adopted by the Judicial Committee. "Victrix causa deis placuit sed victa Catoni."

1 B. & C., 405.

The "Kim"

In this case Sir Samuel Evans dealt with the doctrine of "continuous voyage," which was held to have become part of the Law of Nations. The rules of evidence were also dealt with, and he held that the Court would recognise well-known facts which had come to light in other cases. Held that captors need only prove a

highly probable military or Government destination. XIII.

That it was not incumbent on them to prove an intention on the part of shippers at the commencement of the voyage of despatching contraband goods to the enemy; if it was reasonably certain that the shippers knew the real ultimate hostile destination, whenever the project may have been conceived, a belligerent had a right to seize and confiscate.

The shipment of goods consigned "to order" without naming a consignee was treated as a circumstance of suspicion.

He dealt with the doctrine of "infection," according to which contraband article contaminated any goods on board the ship belonging to the same owners.

With concealment and misdescription.

With the validity of the Orders in Council of Aug. 20 and Oct. 29, 1914, which put into force subject to certain modifications the Declaration of London.

The goods seized were laden in the autumn of 1914 on board four ships for carriage from U.S.A. to Copenhagen; they consisted for the most part of foodstuffs, hog products. There were some two dozen claimants.

Judgment. P. 436.

Having stated the names of the ships, the cargoes, and dates of sailing, he made a general review of the situation which led up to the despatch of the four ships with their cargoes to a Danish port.

Apart from the danger of mines, it was open

XIII. to neutral ships to carry cargoes to German ports subject only to the risk of capture. But the trade of neutrals, other than Scandinavian countries and Holland, with German ports had become so difficult as to become practically impossible. It was not unnatural that it should be deflected to Scandinavian countries and Holland.

He dealt with the figures :

Total weight of cargoes .	73,237,000 lbs.
Total claims . . .	32,312,000 lbs.

He pointed out that there was 13 times as much lard on the four vessels as the annual import into Denmark before the war.

The import of lard from U.S.A. into Scandinavia in Oct. and Nov. 1914 was nearly 60 times the amount imported in the same months in 1913.

These figures made it practically certain that the lard on the four vessels was intended for Germany.

He dealt with the claims of five large American meat packers, amounting to 23,276,584 lbs.

He then made an exhaustive examination of the evidence relating to each claim, drawing particular attention to the absence of evidence as to matters with regard to which evidence might be expected to be given.

He then dealt with the general character of the cargoes and the evidence as to their usefulness for military purposes.

He found that Lübeck, Stettin, and Hamburg might properly be regarded as bases of supply for the enemy, and that the cargoes destined for these ports might on that simple ground be con-

demned as Prize. He preferred to deal with the case on broader grounds. XIII.

Before stating the inferences and conclusions of fact, it will be convenient to investigate and ascertain the legal principles which are to be applied according to International Law, in view of the state of things as they were in 1914. P. 478.

"While the guiding principles must be followed, it is a truism to say that International Law, in order to be adequate as well as just, must have regard to the circumstances of the times, including 'the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it.'"

He then dealt with the doctrine of "continuous voyage." This was first applied by the English Prize Court to unlawful trade. It was applied and extended by the U.S.A. to the carriage of contraband in the Civil War.

The "Peterhoff," 5 Wall., 28; the "Stephen Hart," Blatch., 387; the "Bermuda," 3 Wall., 514; the "Springbok," 5 Wall., 1.

It was asserted by Lord Salisbury in the South African War.

He dealt with the compromise in the Declaration of London. He had no hesitation in pronouncing that the doctrine had become part of the Law of Nations at the commencement of the present war.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to a neutral port, to be there delivered, for the purpose of being incorporated into the common stock of the country.

XIII.

The "William," 5 C. Rob., 385; the "Bermuda," 3 Wall., 514 *ubi sup.*

Another circumstance was the consignment "to order" without naming any consignee.

He had no hesitation in coming to the conclusion that the goods, other than the claims which he allowed, were not destined for the consumption or use in Denmark or intended to be incorporated in the common stock of that country.

P. 483. "The second branch of the case raises the question whether the goods were destined for the use of the German Government or departments, or for the military use of the troops, or other persons actually engaged in warlike operations, or should be presumed to be so destined in the circumstances."

He then dealt with the Orders in Council of Aug. 20 and Oct. 29, 1914,[1] and the arguments founded upon them. He held that all the goods on the "Kim," which sailed after the 29th October, were liable to confiscation under the provisions of the Order in Council of that date.

Apart from the Orders in Council, he came to the conclusion that the goods were intended for military use.

"Now as to the question of proof of intention on the part of the shippers."

It was argued that the Crown, as captors, ought to show that there was an original intention by the shippers to supply goods to the enemy Governments or the armed forces at the inception

[1] These Orders applied with modifications the provisions of the Declaration of London.

of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it.[1]

"It is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference."

The "Bermuda," the "William."

Captors must prove facts from which a reasonable inference of hostile destination can be drawn.

The facts of the case more than justify the "highly probable destination" spoken of by Lord Stowell. He referred to an opinion expressed by eminent American lawyers.

"In a war in which the nation is in arms, where every able-bodied man is under arms and is performing military duty, and where the non-combatant population is organised so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband, especially if the Government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field."

To a decision in the Hamburg Prize Court, the "Maria."

He also held that, on the "doctrine of infection," as the substantial portion of the goods

[1] This was the standpoint taken up by G. B. at the London Conference.

XIII. was destined for military use, the whole would be contaminated.

He allowed seven claims and condemned the rest.

The "Leonora"

1918, p. 182. 3 B. & C., p. 181. B. & C., p. 182.

"An Order in Council of February 16, 1917, after reciting that a German memorandum of February 1, 1917 (aimed at preventing all sea traffic with Great Britain and her allies), rendered it necessary for further measures to be adopted to prevent commodities of any kind reaching or leaving enemy countries, provided that vessels encountered at sea on their way to or from ports in neutral countries affording means of access to enemy territory would, until the contrary was established, be deemed to be carrying goods with an enemy destination or of enemy origin, and that such goods would be subject to condemnation. The vessels carrying them would also be subject to condemnation unless they called at an appointed British or Allied port for the examination of the cargo. No port or ports had in fact been appointed under this Order."

A Dutch steamship bound direct from Rotterdam to Stockholm and her cargo of coal, the produce of Belgian collieries in German occupation, were seized as prize off the Dutch coast under the authority of this Order—*Held*: (*a*) That the order was not contrary to the Law of Nations, and, having regard to all the circumstances, did not entail unreasonable consequences on neutrals. (*b*) That the fact that no British or Allied port had been appointed at which the

vessel might call for examination did not invalidate the Order; the proviso was a relaxation in favour of neutral shipowners who wished to show their bona fides, and was in no sense a condition precedent to the enforcement of the substantive part of the Order. (*c*) That the coal was of enemy origin within the meaning of the Order. (*d*) Accordingly, that the ship and cargo were subject to condemnation.

Judgment. After stating the facts, he said: "The case for the Crown was that the 'Leonora' was carrying goods of enemy origin from a port in a neutral country affording means of access to the enemy territory to a port in a neutral country also affording access to enemy territory, and was therefore liable to capture and condemnation in respect of the carriage of such goods under the Order in Council of February 16, 1917; that the goods were also liable to condemnation under such order." B. & C., p. 190.

The answer of the claimants was: The Order was illegal and invalid as against neutrals; and therefore the capture was wrongful, and neither the vessel nor the goods should be condemned.

The basis of the Order in Council was retaliation, and its object to restrict commerce of the enemy.

He dealt with the circumstances which led up to the issue of the retaliatory order of March 11, 1915.

The naval measures taken by Germany.

That seizure had been held to be valid in the "Stigstad."

He then dealt with naval measures taken by

XIII. Germany after the first order, the submarine warfare, and so on.

3 B. & C., p. 201. He summarised the claimants' contentions.

He then considered the questions that arose:

(1) Whether the Order in Council did or did not comply with the guiding principles of the Law of Nations?

(2) Are there any precedents or decisions in favour of or against its validity?

(3) Is there any authority for or against it? Pp. 202 to 226 should be read; they cannot conveniently be summarised for the present purpose.

He then dealt with cases decided on the famous P. 229. Order in Council following on the Berlin and Milan Decree.

For the reasons given, he was of opinion that in the circumstances existing in February 1917, the recognised guiding principles of International Law justified an Order of retaliation against the enemy with the object of curtailing or throttling his trade, although it prescribed measures outside and beyond the ordinary rules of blockade; that there were good precedents and authority for such an Order; and that if, in view of the whole situation between the belligerents, means for carrying it into effect are not excessive or unreasonable against the enemy, the consequential results to neutrals desiring or willing to trade with the enemy give such neutrals no right to complain, or to claim compensation. After considering other points in the case (see Headnote), he condemned both ship and cargo.

Such was the Judge whom we most unhappily lost before the war ended. But we hardly lost

him before his work was done. The present Master of the Rolls, who succeeded him as President, most generously said to me, after six months' experience of Prize, and with a frankness which one, who like himself is universally admitted to be a consummate judge, can well afford to employ: "There was very little for me to do when I went there. The late President had lucidly and logically evolved all the principles. It only remained to apply them." XIII.

Before his death I was authorised by Mr. Asquith, then Prime Minister, in recognition of the President's extraordinary services, to inform him that he proposed to recommend him to the King for the honour of a peerage. He was touched and pleased, but, for private reasons on which it is not now necessary to enlarge, he was unable to accept this distinction. But he told me that he did most dearly covet one mark of public recognition to which he thought it might be in my power to contribute. He explained that ever since he began his Prize work it had been his hope that the University of Oxford would make him an honorary D.C.L. It seemed to me so certain that the University authorities would rejoice to show honour to the greatest judge of international law since Stowell that I gave him more encouragement than the event warranted. I immediately saw Sir Erle Richards, K.C., the learned Professor of International Law at Oxford University, himself a busy leader in the President's Court, and proposed the matter to him. He warmly agreed, and undertook to place the affair before the

XIII. University authorities. He was, however, incredible as it may seem, quite unsuccessful; for apparently those to whom these matters were committed had resolved to suspend the bestowal of the distinction during the War. I believe, though I am not sure, that they admitted exceptions to this rule. If I am right, no exception thereto could have been more brilliantly defended than the one I now discuss. I reported the result to Sir Samuel, telling him that I was sure his name would be on the first post-war list. He whimsically and rather strangely (for he was not old) replied, "Why, I may be dead then." But I could see that he was very deeply disappointed.

I profoundly regret the answer which was given to an indication of hope which was known to have proceeded from Sir Samuel Evans himself; not that the distinction, great as it is, could have conferred any additional reputation upon the President, but because his Doctorate would have shed fresh lustre on a School devoted to the science of Civil Law.

Of his death there is little that need be told except that he became aware that he was a doomed man some thirty-six hours before he died. He received the news with unruffled serenity, though he was a man who dearly loved life; set himself for many hours with precise detachment to arrange his earthly affairs; and then died in a manner very becoming to a brave Welsh gentleman.

I have said little of the private qualities of the late President. But no more attractive personality for thirty years flashed his sword

in Parliamentary debate, exchanged quips and pleasantries in the robing-room, or enlivened by a penetrating wit the aridity of forensic controversy. In social life he was altogether delightful. No lighter-hearted, no more jocund companion ever sat down to a pleasant table. Dr. Johnson once said (though I cannot, writing at sea, find the precise passage, and may not exactly recall the words), "A man may very well be grave in his study in the morning and cheerful at the tavern in the afternoon." If you substitute the social life which has replaced the tavern, these words might almost afford a summary of the President's philosophy of life. Great judges develop from very strangely contrasted soils. Lord Cairns and Lord Selborne, two of the more illustrious of my predecessors, commenced the day's labours betimes by prayer meetings at their houses, which were largely attended by learned counsel who could perhaps have been persuaded that it was their duty to accept county court judgeships. It is not recorded of the late President that his early morning activities were precisely of this class. But he none the less belongs to the high company of the immortals who have stamped their individuality for all time upon the majestic fabric of British law. And if a warm and tender heart, an unswerving integrity of conduct, and a lofty conception of friendship, are accounted acceptable weights in the scales by which we appraise ethical quality, Sam Evans must be pronounced a good as well as a distinguished man.

XIV

NEIL PRIMROSE

XIV. NEIL PRIMROSE was born on the 14th December 1882. He was the second son of Lord Rosebery, and was brought up almost from childhood in a mixed atmosphere of politics and sport. He retained during his short life a passion for both these occupations.

He was educated at Eton, but left a little early in order to vary and complete his education on the Continent. Those who knew him well before and after this year of absence traced to its influence upon him a certain easy and graceful unconventionality which was one of his greatest charms.

He went to Oxford in his eighteenth year, and I suspect that he spent there the happiest years of his life. At least I remember him telling me in France, when we were talking of old things, that though he had liked Eton much he had liked Oxford more.

His life at the University was by no means studious. Unlike his brilliant and ill-fated contemporary, Raymond Asquith, he did not affect the Union; still less attempt to fill any office there. Little serious academic work was necessary

in the case of so clever a man, who never made academic distinction a goal. And so Neil Primrose went through his short life at New College, hunting and racing and jesting: keeping one eye upon the party politics of the day; reading more than most people supposed of general literature; and forming some of those dear and romantic friendships which cut so deep into his life, and all of which, so far as I know, stayed with him to the end. It was in these years that the friendship between himself and Thomas Agar Robartes first began. They were brothers at Oxford; they were brothers in the House of Commons; they were to die brother-like in the same cause. Very near to him, too, in these days were the ties of affection and friendship which bound him to his Rothschild cousins. There were few more familiar sights at Epsom or Newmarket than that of Neil Primrose and James de Rothschild. XIV.

Primrose left Oxford in 1904, and for some time, though never with violent devotion, began to increase the collateral interest which he had always taken in political people and political topics. But his main occupation at this time was simply to live, and for a young man, rich, well born, fashionable, and charming, merely to live in pre-war England was a most agreeable occupation.

In politics, as became the son of Lord Rosebery, he was a Liberal. And from the time when he first took any serious interest in politics, he was a thorough-going and convinced Liberal. He became, indeed, in the phrase of the day, a far

XIV. more genuine Radical than the great majority of those who were to sit with him in the House of Commons. He genuinely believed in the doctrines of the Manchester School. He derided war as ridiculous, and so soon came to believe that it was also impossible. He was on principle pacifist; disbelieved to the end in the German menace; and would probably have contested the entry of this country into war if the invasion of Belgium had not provided a reason consistent with Radical principle for so staggering and unwelcome an adventure.

The relations between Neil and his distinguished father were among the most touching in a life full of idealised love. The two men were indeed more like brothers in their easy and affectionate intimacy than like father and son. It is evident that the young man owed much to his association with one so witty, so brilliant, and so cultivated. And this makes it all the more surprising that from the very outset Primrose thought for himself in politics, and definitely, if gradually, assumed an individual quality and standpoint which were by no means, either in principle or in detail, those of Lord Rosebery. On one point, however, he followed his father's example by undertaking an active part in the proceedings of the London County Council. He became an alderman of that body in the year 1909, and continued to sustain the duties of that office for four years. Meanwhile, grave and exciting crises were arising in the larger theatre of national politics. The People's Budget, with its ludicrous land taxes, whose complete failure and ultimate repeal lay

still in the womb of time, was exciting a passionate enthusiasm among many credulous sections of society, who pathetically discerned in them the last word of social regeneration. Lord Rosebery, clear-sighted and experienced, thundered against it in Scotland in a speech of burning and eloquent declamation. This oration, unfortunately, alike for them and their followers, convinced the simpler-minded among the leaders of the Unionist party that the quarrel was good enough to justify the House of Lords in throwing out a Budget which had only to be passed for its flagrant follies to manifest themselves. Had that Budget been then passed, it is as certain as anything in politics can be that in twelve months the Unionist party would have been returned to power, and could within a reasonable period have torn up the foolish land sections with the approval of a thoroughly disillusioned people. But though, as I have said, the speech converted the Tory leaders it did not convert Neil Primrose, and consequently the angle from which father and son respectively contemplated the years of crisis that supervened grew more and more divergent. But this fact made not the slightest difference to the singular love and affection by which the two men were united. Neil's enthusiasm, his rapidly acquired skill and humour as a speaker, and his general attractiveness as a Parliamentary candidate, carried him into Parliament in the first election of 1910 as representative of the Wisbech Division of Cambridge. I remember well being introduced to him by Mr. Winston Churchill in the smoke-room of the House of Commons. On this

XIV. occasion, as always in the House of Commons, he was with his friend Robartes, and as I listened to the entertaining talk of these delightful young men, I remember thinking to myself that they were far more agreeable instruments than any we had a right to expect for the purpose of carrying out a post-election policy which evidently must be extremely disagreeable to ourselves.

Thereafter I constantly saw Neil Primrose in the House of Commons and elsewhere. We became close friends. He was a subaltern in the Bucks Yeomanry, as I was in the Oxfordshire, and our two regiments with the Berkshire formed the Brigade. And so, as I look back, many pleasant memories crowd on my mind with which I cannot overload this short narrative. The political alliance and activities of Primrose and Robartes always amused me; and I have some reason for supposing that they also amused themselves. But the business was well and not ineffectively done. Their first campaign was against my predecessor, Lord Loreburn, for his delinquencies —real or supposed—in the appointment of magistrates. The case made was that the Tories had appointed far too many of their number to the Bench under the genial sway of the venerable but slightly partial Halsbury; and that Lord Loreburn, instead of redressing the balance, was combining the practice of his predecessor with the apologetic style of Pecksniff. And so with varying fortunes the quarrel raged, until finally, to the lasting ease of all who sit upon the Woolsack, the compromise was reached which gave the Lord Chancellor of the day an Advisory Com-

mittee, available for his guidance, but not authorised to control his discretion, in every district. XIV.

The next great quarrel which was undertaken sprang from the proposal to exclude from the Coronation Oath certain well-known passages highly offensive to His Majesty's Roman Catholic subjects. This proposal found bitter opponents in the two friends. They carried their opposition to the provinces, and, at a large meeting at Glasgow, Agar Robartes passionately exclaimed:

"I told my constituents at the last election that the issue was between peers and people. Fool that I was, I forgot the Pope."

The allies were not so successful in this quarrel, and the objectionable passage was with almost general consent corrected. There were of course in the years 1910–1914 more serious though less notorious activities, and when the War broke out Neil was very definitely among the selected number of fortunate young men likely to obtain Under-Secretaryships in the infancy of their Parliamentary careers.

Then came the War with all its stern realities, crushing and shattering many beliefs to which Primrose, in spite of a levity of manner which was sometimes assumed, most passionately and sincerely clung. Nor was the lesson learnt at once. He wrote a letter to the *Daily Chronicle* denying that there was any justification for our entry into the War on one day. On the next, the published facts of the invasion of Belgium dispelled the last of his hesitations. On the third day he mobilised as a Troop Officer in his regiment and stayed with them for some weeks,

XIV. until in September of the same year Lord Kitchener, who had a very high opinion of his ability, sent him to do some staff work in France with a distinct promise that, whenever his regiment was ordered on active service, he should be given immediate leave to rejoin it. For the next few months I saw him constantly. It is to this period of his life that our real intimacy belongs, and when in the spring of 1915 he was summoned home to become Under-Secretary for Foreign Affairs, he wrote me a letter of which I am glad to recall the sentence: "Our friendship in the last few months has deepened and strengthened. It has become a great thing in my life. Time can never congeal it."

The formation of the first Coalition Government substituted Lord Robert Cecil for Primrose at the Foreign Office, and at the same moment the employment of his regiment in the East left him with a clear course. He joined his regiment, served with great distinction in the Senussi campaign, and was awarded the Military Cross. It became evident in September 1916 that the campaign was over for the time being, and, as an alternative to inaction in the Libyan Desert, the invitation to become Military Secretary to the Minister of Munitions was welcome. He held this office from September to December 1916. By the latter date the differences between Mr. Asquith and Mr. Lloyd George had culminated in the substitution of the latter for the former, and Neil Primrose was urgently requested by the new Prime Minister to undertake the most difficult duty of Patronage Secretary. His friendship and

admiration for Mr. Lloyd George made the task easy, but there was a prospect of the regiment becoming engaged again, and Primrose made it plain that he did not intend to be away from active service longer than was absolutely necessary to give the new regime a start. At the moment, as indeed for long afterwards, the bitterness between the two sections of Liberals was extreme, and Neil's tact, popularity, and good temper were an asset of incomparable value to the new Government. But in May 1917 he resigned his position as Parliamentary Secretary to the Treasury and prepared to rejoin his regiment, which was then organising for the advance on Jerusalem. His old friend, Colonel Cripps, D.S.O., who was then commanding the regiment, writes to me of him: "I cannot describe to you what an extraordinary effect his presence and personality had upon the officers and men." He became Squadron Commander. Towards the end of October the signs of activity multiplied, and the campaign began under Allenby, which was not to end until Jerusalem had fallen before His Majesty's troops. The Bucks Yeomanry was incessantly moving, and was engaged in many minor skirmishes. But it was not until November 13 that it took part in any considerable battle. Neil commanded his squadron in the mounted charge at El Mughar, which was singularly successful. He was warmly praised by his Commanding Officer, but his happiness in the day's achievement was completely marred by the death of his cousin, Evelyn Rothschild, who was wounded in the same charge and succumbed later.

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On November 15, the regiment again took part in an attack on Abu Shushuh. Neil's was the leading squadron; and the Bucks was the leading regiment. Under very heavy machine-gun fire, he was compelled to dismount his squadron to make an advance on foot over some very bad ground. He was standing up coolly giving orders to his men when he was shot through the head by machine-gun fire at very close range.

His Commanding Officer wrote of him: "Much of the success of battle was due to the initiative of Major Primrose during the first phases of the attack. He would most certainly have been recommended for the D.S.O. had he survived."

I have attempted a very brief and imperfect summary of the life of a most vivid personality. He had only been in the House of Commons for four years when the War broke out; and it is therefore hardly possible to attempt a dogmatic estimate of his political, and still less of his Parliamentary, gifts. It is, however, sufficient to say that, at the end of those four years, he had most deeply impressed by his power and his intelligence the ablest statesmen of this country. Who can define that subtle quality which leaves a mark and a memory? I met him often in very distinguished company. I never met him in any company in the conversation of which he was not an easy and graceful equal. Mr. Lloyd George, a considerable judge of men, selected him from all his Liberal adherents to discharge the infinitely delicate task of creating the organisation of a new Liberal party. I suspect that Mr. Lloyd George was under no delusions as to the

difficulty of this task, and I know with certainty that Neil Primrose was under none. Surely a greater compliment was never paid to a young man of fashion who had only been four years in the House of Commons. The qualities of Patronage Secretary, where the duty is tactfully and efficiently discharged, must be of the highest possible order. He is a servant of his chief, but he must be at the same time his eyes and his ears. I am even bold enough to think that no one can be a perfect Patronage Secretary who is not in the first place utterly indifferent as to whether he continues to fill that office or not, and who is not in the second place authorised to discuss the highest matters with his chief upon a basis of almost equal responsibility. Such at least, as I can assert from my own knowledge, was the actual relationship between the young captain of the Bucks Yeomanry and the greatest of the War Ministers who have guided the destinies of this country since Chatham. Nor was Mr. Lloyd George alone in his estimate of the capacity of Primrose. Mr. Winston Churchill was among the most devoted of his friends, and I have reason to know that the value and the affection which he had for him were not less than those of him who writes this imperfect memorial. Mr. Asquith, too, from whose political fortunes he had unwillingly but quite irrevocably dissociated himself, uttered in the House of Commons a noble and generous tribute on the occasion of his death.

XIV.

"Only those who knew him well, as I knew him well, can realise how much golden promise lies buried in the grave of Neil Primrose."

XIV. A few words of a general kind may be added about this very remarkable young man. He was of a very quick intelligence. His conclusions were as often the result of intuition as of reason, but on matters within his own province they were very seldom wrong. He was a most polished man of the world—perhaps the most polished man of the world of his own generation. His conversation was light, witty, and humorous, but nevertheless there generally lay behind its flippant presentation a point of view, and a degree of conviction, which were serious in the French sense of that abused adjective. To some extent he was a cynic: to a greater extent he affected cynicism. He was in truth a cynic with a warm heart and a cold tongue. No one in the world of our day was half as good company. He would have delighted Dr. Johnson as Topham Beauclerk delighted him. I can imagine him playing up to that wise but difficult old man, and I can see the thaw melting the frost. I had the chance of observing him in many companies, some grave, some very bohemian. In neither had any one so exactly appraised the atmosphere as Neil Primrose: to neither was the contribution of any one else so intuitive, so spontaneous, so appropriate.

And I must add a final tribute in a graver key. The friendships of his life were the passions of his life. I suspect, indeed, that he found more in friendship, as he certainly gave more to friendship, than any one of our day and generation. Many men whose like we cannot hope to see again perished in the Great War. Neil Primrose died with a bullet through his head steadying and

reanimating his troops: he fell amid the general mourning of those who knew and valued and loved him: *nulli flebilior quam mihi.* XIV.

Piety imposes upon the company of his friends a simple task—never to forget him. In discharging it we shall constantly recall that the company, of which he was one, mourns the death of a gay, brilliant, and affectionate friend.

XV

JACK SCOTT

XV. A VERY large group of devoted friends will learn with deep sense of personal bereavement of the untimely death of the young officer who, since his Oxford days, has been universally known as Jack Scott.

A fortnight ago he took the first holiday which he had allowed himself for fifteen months. He went with a number of friends to St. Moritz. Until the end of his visit he appeared to be in all his usual robust strength. A day or two before he left, he was seized with a cold of an ordinary kind causing no anxiety. He stayed on the way home for a day or two in Paris, where the cold developed with a slight but not serious bronchial menace. A little unwisely, but taking a risk which many strong men have often taken without untoward consequence, he decided to cross to England. His condition on the voyage became worse. On his arrival, the case was diagnosed as one of double pneumonia, and in four days he was dead.

The name of this distinguished officer was almost, if not quite, unknown to the general public, and yet there was in the British Army

no more arresting and remarkable figure. I first met him fifteen years ago, when he was an undergraduate at Merton College and Master of the University Draghounds.. I never saw any one, in my long experience of the hunting field, ride with a resolution and fearlessness so complete. He stamped himself even then upon my mind as one who had no conception whatever of the meaning or pressure of fear. Acquaintance ripened rapidly into friendship, and fuller knowledge of his practice in the hunting field confirmed my clear conviction that he was the bravest man I ever saw riding to hounds. XV.

He intended to go to the Bar, and in due course became a pupil in my chambers. He showed great industry and ability without any special promise of that undefinable combination of qualities which is the soil of great forensic success. His career and his greatness were to lie in a very different field.

In August 1914 he was a junior officer in the Sussex Yeomanry, consumed, as many young officers at that moment detained in England were, with a burning desire to undertake active service at the earliest moment. He had never in his life been in an aeroplane; he was over thirty years old; but the air, and the prospect of air fighting, made an irresistible appeal to his adventurous nature. Quite early in the War he joined the R.A.F., and thereafter commenced an Odyssey of hazard, adventure, and terrible accidents which can hardly have been exceeded in the annals of the air. On one occasion before he went to France his machine collapsed when he

was 2000 feet in the air. During the terrible fall that followed he was working and trying and testing, and when some 60 feet from the ground he regained a degree of control which saved his life but left him permanently a cripple. He lay for many months in hospital, during which the doctors could give no assurance that he would ever leave his bed. An immensely strong constitution asserted itself, and he was later found working on crutches at the R.A.F. staff at De Keyser's Hotel.

As soon as he became strong enough to walk unaided, he began again to strain every influence he possessed to obtain leave to go on active service in France. "To fight in an aeroplane," he said, "is the one thing a lame man can do as well as another." His own doctor told me that he was quite unfit to go, and without daring to inform Jack Scott of what I was doing, I went to General Henderson and placed the medical report before him. For the moment I succeeded, but a month later he came round to our house, the embodiment of gaiety, and told us he was under orders to proceed to France in the following week as a Flight Commander. Two and a half months later he was appointed to the command of the 60th Squadron.

It is not an exaggeration to say that in a service manned by heroes he was universally admitted within three months to be one of the most brilliant and daring. He carried, indeed, to the combats of the air the chivalry of Athos and the Gascon audacity of d'Artagnan. Major Bishop, V.C., was under his command in the squadron, and he himself told me at a later period

that for cool and unshakable courage he never in his experience met Scott's equal. Readers of Bishop's book will remember the part played by the "Major" in one of its most thrilling episodes. The "Major" was Jack Scott. He had escape after escape, and those who knew him began to say that he bore a charmed life. And he continued to fight in the air, commanding the 60th Squadron, which became known as the V.C. Squadron, and habitually violating the rule which, in that stage of the struggle, forbade the commanding officers of squadrons to engage personally in air combat. When positively forbidden to engage, he positively refused to obey, saying, "I will not send boys to fight unless I go with them. Lower my rank if you like, and then I can fight." He met with accident after accident, until hardly a part of his body was quite unscathed, but it seemed as if no risk, or combination of risks, could destroy so tenacious a life or daunt a spirit so buoyant.

He was promoted from the 60th Squadron to the command of the XIth Wing, and there, too, though a Lieutenant-Colonel, he insisted on flying over the line in defiance of orders. It was notorious in the service that this glorious disobedience alone excluded him from the highest decorations. His subordinates obtained them on his recommendation. He was next appointed to the important post of Commandant of the Central Flying School at Upavon, which he gave up only to return to France to command another Wing.

In 1920 he wrote the history of his old squadron

XV. in soldierly and unpretentious fashion, but not without considerable literary skill.

When the War ended, he was offered a permanent commission in the Air Force, which had learnt to recognise that he was not only a dashing fighter, but that he possessed in addition unusual qualities of mind and of organising capacity. Shortly afterwards, he was appointed Air Secretary to Mr. Winston Churchill, who was at that time Secretary of State both for the War Office and for the Air Force. He retained this position under Captain Guest, and held it at the time of his death. There can be no doubt that he would have risen to the highest position in his profession, and I may, perhaps, be bold enough, now that he is dead, to say that the present Secretary of State for Air told me quite recently that he thought him an officer very likely to become one day Chief of the Air Staff.

And quite suddenly all this promise is extinguished as the result of a neglected ailment, and he who for so long with dauntless eyes faced and challenged death has fallen on the assault of disease before an inscrutable decree. None who knew him will ever forget his striking personality. His finely shaped head gave certain promise of indomitable resolution. Indeed, its ruthless power was qualified only by its latent humour and its delightful and attractive simplicity. I know of no character in history or fiction of whom he more constantly reminded me than of "Valiant," in *Pilgrim's Progress*, walking into the dark river. And like Valiant, he, too, during four years of cool and inextinguishable daring, might have

asked, and with the same contempt, "O Death, where is thy sting? O Grave, where is thy victory?" xv.

And I think that for him too, as he neared the other bank, the trumpets must have sounded.

Of the affections of his life and of his friendships, though both are well known to me, I do not at this moment speak, but a more constant heart never beat for those whom he loved, nor a more valiant one for England. May his brave spirit rest in peace!

XVI

EDWARD HORNER

XVI. EDWARD HORNER was born on May 3, 1888, of the ancient and well-known Horner family of Mells, Frome. He was educated at Summerfields and at Eton, passing into College at the election in 1901, but his father, Sir John Horner, decided to send him as an oppidan, and his Eton life was spent in Mr. Impey's House. In 1906 he went to Balliol. His chief friends at Eton and at Balliol were a brilliant and ill-fated band of whom much has been written. The two Grenfells, Patrick Shaw Stewart, Charles Lister, Anderson, Raymond Asquith, Vernon, and Anson. All are dead. When he left Oxford he decided to be called to the Bar, and came in due course as a pupil to my chambers, beginning his work there in 1910. Thereafter he became one of my intimate friends, often staying with me, and on one occasion he made a long expedition in my company to the United States of America and Canada.

When the War broke out, he held a subaltern's commission in the yeomanry of his native county. He mobilised at once with his regiment, but becoming convinced that the yeomanry would not be sent to any theatre of war without much

delay, and being passionately anxious to take his part at the earliest moment, he began to use all the influence he possessed to obtain a transfer into a regiment of the Regular Army. After much effort, and largely by the help of his friend, Lord Haldane, he obtained a commission in the 18th (Q.M.O.) Hussars and proceeded to France in the black spring of 1915. He was engaged in the heavy fighting which followed the second battle of Neuve Chapelle, and sustained a grave and very dangerous wound, being shot in the stomach very soon after his arrival. For months he lay between life and death. He suffered extraordinary pain, culminating in an operation by which one kidney was removed. I saw him months after his wound in a nursing home. I should hardly have recognised him. A pale shadow of his former self, he had hardly strength to make himself audible in the small room. But youth and a fine constitution triumphed, and though I always fancied afterwards that he never quite regained all his old buoyancy, his restoration to health seemed fairly complete. He was, however, for a long time only allowed to do light training work in England. Wearying of the tedium, and being still pronounced unfit for regimental work, he asked me to try and obtain for him some suitable occupation on the staff in Egypt. The attempt proved successful and he proceeded to Egypt, serving there for some months. But with growing health and strength came growing impatience of a non-combatant rôle, and after I know not what solicitations, he obtained leave to rejoin his regiment in France.

XVI. He had already been offered honourable and useful occupation in England by Lord French, but he knew that his regiment, which had sustained many casualties, was in need of him. He returned to the front, and was heavily engaged from the 13th to the 21st November 1917, and on the 21st, No. 4 Troop, of which he was in command, was holding the entrance of the village of Noyelles against strongly pressed German infantry attacks. The Troop had just repelled one such assault. Captain Joynson, the Senior Officer in the neighbourhood, hearing the cheers, came over to learn the cause, and left after congratulating his friend and comrade. He never saw him again. A few moments later, Edward was struck, again in the stomach, by the bullet, fired at close range, of a German sniper, and a few hours later he was dead. This time he appeared to suffer no pain. He seemed to fall gradually into a state of coma. He only spoke once after his wound, asking the Chaplain, as he lay at the dressing-station, if he would be sure to let his people at home know "how things have been with me." Very soon afterwards he died.

Such in very brief outline was the life history of one who, in a short time, had stamped a rare, and even a wonderful, personality upon the affections of many very different friends. Six feet four inches in height, broad shouldered, lithe and muscular, with a superbly shaped head and neck, he was a picture of radiant masculine beauty. The noble statue of Mr. Munnings, recently exhibited under the words, "A Cavalry Subaltern," which is to be placed in memory of

him near the church at Mells, affords a wonderful picture alike of him and of his type. XVI.

It was in my eyes one of his principal charms that he united with a form so masculine and with a passion for, and a proficiency in, the most dangerous masculine pursuits, a caressing and sympathetic charm which was entirely feminine. His gaiety, his love for friends, were unsurpassed even among that remarkable brotherhood, all of whom lavished love upon noble and worthy friends. Edward Horner looked on life as a magnificent adventure to be lived magnificently and in the great style. He could not be niggardly of himself, of his strength, or of anything that he possessed, and he was ready to bestow all these more gladly upon the necessities of a friend than upon his own. To listen to the troubles of others, to alleviate them by comfort or by sympathy, was part of a very precious gift. He was a much younger and a much less experienced man than I, but there was something about him which always impelled me to go to him with troubles, great and small, however secret these might be. He knew that he could help if only by listening and caring. And he both listened and cared.

He had a strong, lively, and in some ways even a brilliant intelligence. Sustained and detailed application was laborious to him. But he was gradually acquiring its discipline when the War broke out, and I myself am of opinion that he would have done well at the Bar. Quick, polished, handsome, and intelligent, he brought to its competition a rare and rich accumulation of gifts.

XVI. A nature which gave so much to its friends was unlikely to be lacking in the more sacred sphere of family affection. The relationship between himself and his mother, Lady Horner, was in all its aspects beautiful. But of this I say no more.

The last letter he wrote from France before his death was dated the 17th November 1917, just after his return from leave in England. It is a short and scribbled note, but I print it here because it was characteristic, and because it contains the last words that he is known to have written :

> . . . Things are looking much better to-day. We are likely to move almost at once, and shall have something to do.
>
> I suppose it was reaction after leave, but on arrival here I felt cross, and they would all draw attention to it asking why, and so forth, which always makes one worse. To-day things changed and every one seems attractive again, and we had a lovely dinner with singing and laughter, and I feel the connection between my love for my companions, and my love of you. Bless you all.—E.

With him perished the last hope of direct male succession in an ancient and honourable English house. And there passed too a gay, sunny, and adorable nature, the love of which made life sweeter and will keep it permanently sweeter for many.

XVII

JUDGES AND POLITICS

DURING the month of March of this year questions arose, and were debated at some length in the House of Lords, which turn upon the constitutional position of the Judicial Bench and in particular of those Judges who sit in that House *virtute officii*. The controversy sprang almost as a side issue from the debates upon the Irish Free State Agreement Bill, and, as often happens, its permanent importance was somewhat obscured by the personal interests involved. The doctrines which were enunciated were of great gravity, and some of them, especially those which were laid down by Lord Salisbury on the 29th March, were somewhat astonishing. If it had appeared that those doctrines were held only by laymen I should not consider it necessary to recur to the subject. I had supposed, until I listened to the debate, that the constitutional position was clear, and that no one desired to see some modern Ellenborough sitting in the Cabinet as Lord Chief Justice, or some modern Sir Hugh Cairns hastening from the Strand, after sitting in the Court of Appeal until 4 o'clock, to lead the opposition in the House of Lords. Such

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apparently is the desire of Lord Salisbury. His speech would have made his sagacious and experienced father shudder. But though we welcome and tremble before Lord Salisbury's fiery irruptions in debate, I should not have thought myself compelled, by the depth of his constitutional learning, to think that his intervention in the matter required any further restatement of the modern constitutional practice. It is rather because my noble friend and immediate predecessor upon the Woolsack — Viscount Finlay — committed himself to views upon this subject, which seem to me unsound in their conception, and disastrous if carried into execution, that I think it well to deal with it at greater length than is possible in the House itself.

The matter arose in part from the intervention of several of the Lords of Appeal in Ordinary in the Irish debates, and in part from a political speech delivered by one of those Lords of Appeal in the country. Much was said by that noble Lord, whose conduct I ventured to criticise, about his personal honour. No question of personal honour and indeed no personal question of any kind enters into the matter. The subjects for consideration are: what is the course of conduct which modern theory and practice impose upon Judges in relation to politics, and in particular upon those Judges who are members of the Upper House; what is best in the interests of the administration of justice, and of the respect and authority which ought to be possessed by our Courts of Law, and in particular by the two Supreme Appellate Tribunals of the Empire—

the House of Lords and the Judicial Committee of the Privy Council. If there is any rule or convention which in effect forbids the Lords of Appeal in Ordinary from taking an active part in political controversy—either within or without the House of Lords—should that rule or convention apply also to the Lord Chancellor and to the ex-Lord Chancellors; or, in the alternative, if there is no such rule or convention binding these judicial personages, should such a rule bind the Judges of the Supreme Court. Should they be released from the prohibition which at present prevents them by Statute from sitting in the House of Commons. Again—it being conceded that Recorders of provincial towns and those magistrates who are not appointed under the Acts relating to Police Magistrates and Stipendiary Magistrates take an active part in politics and sit in the House of Commons—should not this liberty be extended upwards as it were, so that, from the Lord Chancellor to the member of any County or Borough Bench, all those, whether lawyers or laymen, who take part in the administration of justice should be free to place their services at the disposal of the State in political matters, and be able from their places in Parliament to give to Parliament the inestimable advantage of their judicial experience. XVII.

Now on all these points Lord Finlay is clear. He thinks with regard to the Judicial Bench—"the common law Bench and the Judges of equity . . . that there is a long and unbroken tradition that they should not take part in political life." He thinks that there is some case for

XVII. applying a similar prohibition to such Judges as Recorders. But with regard to the Lords of Appeal in Ordinary, he thinks that there is "no such convention and no such rule." Furthermore, he thinks that there ought not to be such a convention. And he deals with the arguments which I addressed to the House of Lords in the matter as follows:

"The Lord Chancellor takes the case of the ordinary Judges. He says that there is a well-established rule with regard to them. They are Judges, and Lords of Appeal here are also Judges. Therefore, if the common law Judges are excluded from politics it follows that the Lords of Appeal here, being Judges, are also to be excluded. That is not the way in which the law of England has been built up."[1]

I fully agree that the law of England, especially in such matters, has not been built up by clear-cut deductions such as these. It has been built up piece by piece, and to some extent haphazard, to meet particular emergencies as they arose. Very often that which is alleged to be the foundation of some constitutional doctrine has been invented to account for the existence of the doctrine itself. Very often from some constitutional principle there have followed consequences which were never intended by its framers. Our love for precedent, our desire to seek in precedent rather than in principle for the reasons of things as we find them, or as we think they ought to be, have often produced curious results. The history of the separation between the judiciary

[1] *Hansard*, vol. xlix. p. 953.

and the legislature is one of the most striking of these processes of constitutional evolution. XVII.

There was a time when the High Court of Parliament was a Court indeed, and when legal personages preponderated among those who made as well as interpreted the law. By slow degrees the hereditary principle prevailed, and the Judges, the Attorney- and Solicitor-Generals, the King's Serjeants-at-Law, and the Masters in Chancery became merely legal assessors, assistant or attendant upon the House.

The fact that they were thus assistant or attendant became the ground alleged for the exclusion of the common law Judges from the other House. It is curious to notice the exact form of the decision. On Saturday, 9th November 1605, the Committee for Returns and Privileges of the House of Commons "returning to the House make report by Sir George Moore" of the cases which they had to consider. It will be remembered that service in the House of Commons was not looked upon universally as an object of ambition. The Report of the Committee was as follows:

Lyme Regis: The Burgess Hassard not able to serve, by reason of the gout. He came unto them, walked in fear only. *Resolved*, That he should serve still.

Weak, and not able to serve, by reason of age and not likely to recover: *Swaddon*, for *Calne* in *Wiltshire*: To be removed.

Serjeant *Snigg* } Attendants as Judges in the Higher
Lord Chief Baron } House.

Not to serve here. If a Serjeant, to serve here.

Sir Henry Carye, Captive: To stand still as a Burgess.

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Then follow the decisions of the House upon the Report.

(Q.) Whether *Hassard* shall stand and serve ?

Resolved. He shall not be removed.

(Q.) Whether *Swaddon*, for *Calne*, shall be removed ?

Resolved. He shall, and a new Writ to issue.

(Q). Touching Lord Chief Baron, Burgess for *South*, and Baron *Snigg* for *Bristowe*, being Attendants as Judges in the Higher House, whether they shall be recalled ?

Resolved. They shall not.

Thus with the intimate personal details as to the illness of poor Mr. Hassard, who was condemned to serve, and fortunate Mr. Swaddon, who was allowed to retire to his native Wiltshire, there was decided once and for all the constitutional question whether the Judges of the Common Law Courts should sit in the House of Commons.

It will be observed that nothing is said of the Attorney-General, the Solicitor-General, the Master of the Rolls, and the other Masters in Chancery. But all these personages continued for many years to act as attendants or assistants in the House of Lords, and in fact precisely the same argument applied to them as to the Judges who were declared disqualified.

The Parliamentary history of these officials is worthy of attention in detail.

For some reason, which is nowhere stated, the House of Commons excluded the Attorney and admitted the Solicitor and the King's Serjeants, "upon what distinction . . . I do not know," says Hatsell.[1] It is not absolutely clear either

[1] *Parliamentary Precedents*, 1818.

from Dugdale's *Summons to Parliament* ("A perfect copy of all Summons of the Nobility to the Great Councils and Parliaments of this Realm from the XLIX of Henry the IIId. until these present Times," Sir William Dugdale, London, 1685), or from *Parliament Pawns* (*i.e.* the enrolments in the Office of the Petty Bag of writs of summons to Parliament and of election writs from 30 Henry VIII.) that both the Attorney and the Solicitor invariably received writs to the Upper House before the 36th year of Henry VIII., but it is probable that neither of these sources of information is complete. Thus from the 49th year of Henry VI. to the 21st year of Henry VIII. it is certain from Dugdale that writs were issued to the Judges and to the Attorney-General, but there is no mention of the Solicitor-General.

After the 21st year of Henry VIII. the Judges' writs are no longer mentioned nor are the Judges mentioned as receiving writs. But this cannot be due to any alteration in practice, since both the Judges and the Serjeants-at-Law are mentioned as attending the opening of Parliament in an account of the ceremonial at page 508 of Dugdale, 28th April, 31 Henry VIII.

In the 30th year of Henry VIII. the name of J. Baker, Attorney-General, is written in *Parliament Pawns*, but it is crossed out and the name of "Edward Gryffin, Solicitor to the King," substituted.

The next parchment in *Parliament Pawns* is the 36th Henry VIII., and there and in the 1st of Edward VI., 1st of James I., and the 21st of James I., the names of the Attorney- and Solicitor-

XVII. Generals appear at the end of the list of the Judges, and from the latter date to the 30th of Charles II. they are named with the Judges in all pawns.

As to the sitting of the Attorney in the Commons the question arose on the 22nd November 1606, when "there was much dispute and confusion touching the case of Sir Henry Hobart, Attorney-General ('many precedents of the King's Serjeant and Solicitor, but none for the Attorney; *sed eadem ratio*,' says the *Journal*, quoted in Hatsell). At last, it was by voice overruled, that no question should be made of it, but that the matter should rest. And on the 24th Mr. Attorney came in of himself, and continued, by connivance, without other order."

This did not end the matter, however. It arose again in 1614 when the House, after the Report of the Committee to search for precedents, resolved "that the Attorney-General shall for this Parliament remain, but that no Attorney-General shall serve as a Member after this Parliament." In 1620 this decision was acted upon, and a new writ issued upon the appointment of the Attorney-General, and in 1625 upon the appointment of Sir Robert Heath to be Attorney-General, and in 1640 upon the appointment of Mr. Herbert to that office, the same course was followed. But in 1670 Heneage Finch, who had been Member for the University of Oxford since 1661, was appointed Attorney-General. He retained his seat until 1673 when he was appointed Lord Keeper. As in the case in 1606, there must have been "connivance." At least no one seems

to have taken any objection, and from that day to this the custom that the Attorney-General should be a Member of the House of Commons has remained unchallenged. Be it remembered that like his brother law-officer, the Solicitor-General, he receives a writ to the House of Lords. XVII.

The case of the Solicitor-General seems to have arisen and been decided once and for all in 1566. In that year Richard Onslow, Burgess for Steyning, was thought of for the office of Speaker which was then vacant through death. He was at the time Solicitor-General and was "sent down by the House of Lords with the Queen's Serjeant-at-Law and the Attorney-General 'to show for himself why he should not be a Member of the House,' but though he alleged many weighty reasons from his office of Solicitor and from his writ of attendance in the Upper House yet he was nevertheless adjudged to be a Member of the Commons." As to the Serjeants, the decision of 1605 seems to have been that they should serve in the House of Commons if elected. This decision rested upon a resolution of the 17th February 1575, that "according to old precedents Mr. Serjeant Geoffrey, returned one of the Knights for Sussex, may have voice, and give his attendance as a Member, notwithstanding his attendance in the Higher House, as one of the Queen's Serjeants, for his Counsel there; as the place where he hath no voice, nor is any Member of the same."

The King's Serjeant continued therefore to sit in the Commons, if elected, so long as King's Serjeants existed. The last writ directed to a

XVII. Queen's Serjeant to attend the Upper House issued in the 20th year of Queen Victoria (1857) to Serjeant Byles upon his creation as Queen's Serjeant.

The Masters in Chancery also sat until their office ceased to exist upon the passing of the Masters in Chancery Abolition Act, 1852 (15 & 16 Vict. c. 80), but their eligibility for the Commons was not always beyond question. In 1833 the Act of 3 & 4 Wm. IV. c. 94 vested in the Crown their appointment, which had hitherto been in the Lord Chancellor, and in 1838 upon the acceptance by Mr. Lynch, who was then Member for Galway, of the Office of Master in Chancery, he was held to have vacated his seat and a new writ was issued. He was re-elected and a petition was thereupon presented against him on the ground that he was disqualified for election to the House of Commons, the office—as it was contended—having by the operation of the Act of William become a new office within the meaning of the Statute 6 Anne, c. 7. The case was very fully argued[1] before a Committee of the House of Commons, which resolved that Mr. Lynch was duly elected. They with great discretion refrained from giving any reasons for their decision.

The Master of the Rolls was eligible as a member of the House of Commons until the Judicature Act, 1873, came into operation on the 1st November 1875. His case is the most anomalous of all, but, as in the middle of the nineteenth century it furnished the occasion for

[1] Falconer and FitzHerbert, p. 579.

that speech by Lord Macaulay which has been much cited during the present discussion, I will postpone the consideration of his position until a later stage of this argument.

It should perhaps be stated that from time to time the writers of text-books or precedent books —being puzzled by the distinction made between the position of the various judicial or legal officers —have sought to base it in part on the supposition that some of them were "assistant" and some "attendant" in the House of Lords. If the *Journals* and the *Parliament Pawns* are searched this appears to be a distinction without a difference. All these persons are summoned by the same form of writ, and neither the word "assistant" nor the word "attendant" appears in the writ. All seem indifferently to perform the same offices for the Upper House. Sometimes the Master of the Rolls and sometimes the Attorney-General acts as a Messenger from the Upper to the Lower House. It would appear that the word "attendant" or "assistant" is used according to the taste or fancy of the person who uses it. It is, however, worth noticing that the Master of the Rolls in 1690 describes himself as "assistant." There is no doubt that he was on occasion a messenger from the Lords to the Commons, and was, so late as the 19th December 1640, employed in that capacity.

Lord Macaulay appears to have supposed that Judges are excluded from the House of Commons, and should continue to be excluded, because "it would be inconsistent with the privileges and dignity of this House (that is the Commons) to

XVII. have any member here who is at the beck and call of the other House," [1] and Judge Atherley Jones in a recent letter to the *Times* improves upon Macaulay's authority and gives as the reason "they (*sc.* the Judges) were employed as bearers of messages from the Lords to the Commons. The democratic pride of the Commons would not tolerate that the 'attendants' of the Lords should sit in their House, and in 1605, by resolution, they excluded them." As the facts above set out show, this is not the way in which the law of England has been built up, though it is the way in which history comes to be written. It is clear that if any democratic pride had entered into the matter it would equally have forbidden the sitting in the House of Commons of the other legal personages who had seats but no voice in the Lords.

In truth, we do not know with certainty what determined the Commons to reach the resolution of 1605, yet it is not beyond all conjecture. Professor Gardiner [2] has described the silent change in the composition of the House of Commons which had been taking place during the last days of the Tudors. "The old rule had been relaxed which forbade any member to sit for a place in which he was not resident." He points out the evils which resulted from that change and continues, "but this was as nothing in comparison with the advantage which arose from the introduction into the House of a large

[1] *Hansard*, 3rd series, vol. cxxvii. col. 1008.

[2] *History of England from the Accession of James I. to the Outbreak of Civil War*, vol. i. p. 161.

body of men of ability recruited especially from amongst the lawyers. . . . The services which this class of men rendered to the cause of freedom were incalculable. . . . A few years later a race of Parliamentary statesmen would begin to arise from amongst the country gentlemen. . . . For the present, the burden of the conflict in the Commons lay upon the lawyers, who at once gave to the struggle against the Crown that strong legal character which it never afterwards lost." It may well be that such a change was accompanied by certain reactions such as those which in earlier days had led to the "Unlearned Parliament," and that the laymen were glad to get rid of at least one most conspicuous type of lawyer—those who had attained the comparative security of the Bench.

But if this jealousy entered into the consideration of the question, it is not the whole of the matter. The security of the Judge's tenure was as yet not absolute. In 1606 Coke took his place upon the Bench, and there began the long constitutional struggle which was only finally closed by the Act of Settlement. I have searched the Docquet Books in the Crown Office in Chancery and the Index to the Patent Rolls relating to the appointments of Judges of the King's Bench, Upper Bench, and Common Pleas, and Barons of the Exchequer from 1613 (11 Jac. I.) to 1703 (2 Anne). The task was one of some difficulty, for the Index to the Patent Rolls for parts of the reigns of Charles I. and Charles II. is in bad condition and the sheets relating to several "reigning years" appear to have been mixed

XVII. in rebinding. The Docquet Books for the same period are not indexed and in many parts the entries are very badly written.

Subject to these observations, my search, put briefly, gives the following results:

From 18 Jac. I. (1620) to 10 Car. I. (1634) all Judges' Patents are "during pleasure." From 16 Car. I. (1640) to 21 Car. II. (1668) all (with one exception) are *quam diu se bene gesserit*, though Foss[1] says of Newdigate, who was appointed Justice of the Upper Bench on the 2nd June 1654, that he "was turned out by the Protector for 'not observing his pleasure,' notwithstanding the *quam diu se bene gesserit* of his Patent." The exception is the Patent of Foster C. J., King's Bench, October 22, 1661. His Patent says *vobis mandamus qd officio illis intendatis.*

On the 6th February 1668–69, Richard Rainsford was appointed a Judge of the King's Bench "during pleasure" (Crown Office Docquet Book). His Patent is no doubt that which is referred to by Foss[2] where he says "A direct proof of the attempt to render the Judges subservient to the Court is to be seen in the substitution of the old form in their patents, of *durante bene placito*, for *quam diu se bene gesserit*, which had been conceded by Charles I., and had been adopted in all the earlier patents after the Restoration."

This is the first of a long series of Patents "during pleasure," which extends through the

[1] *Judges of England*, vol. vi. p. 400.
[2] *Ibid.* vol. vii. p. 4.

remainder of Charles II.'s reign, and through the whole of James II. into the first year of William and Mary; and readers of Lord Campbell's *Lives of the Lord Chief Justices* will remember the procession of transient and embarrassed phantoms who rapidly displaced one another in the office of Chief Justice during the years immediately preceding the Revolution. XVII.

On the 18th March 1689 (1 Wm. & Mary), William Dolben, Edward Nevile, and John Powell were appointed "during pleasure" to the King's Bench, Exchequer, and Common Pleas respectively. These are the last appointments on this tenure; a month later (20th April 1689) they were reappointed *quam diu se bene gesserint.* Henceforth the Docquet Book entries of Judges' Patents from 1689 to the 2nd year of Anne are all *quam diu se bene gesserit,* and by the Act of Settlement (12 & 13 Wm. III. c. 2, s. 3) it was enacted "that after the said limitation (that is upon the House of Hanover) shall take effect as aforesaid, Judges' Commissions shall be made *quam diu se bene gesserint* and their salaries ascertained and established; but upon an address of both Houses of Parliament it may be lawful to remove them."

Thus the seventeenth century, which commenced with Judges capable of sitting in the House of Commons, but dependent for their security on the Bench wholly upon the pleasure of the Crown, ended with the assertion, as regards the Common Law Judges at least, of two constitutional doctrines, which would generally be regarded as fundamental, that they should be excluded absolutely from popular election, and

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absolutely secure from the influence of the executive Government.

The existing Equity Judges remained unaffected. But except in so far as the Lord Chancellor and the Master of the Rolls sat as Judges of First Instance, there were no Judges in Equity holding a position corresponding to that of those who sat on the Common Law Bench. The first Equity Puisne Judge, if so he may be termed, was the Vice-Chancellor of England, appointed, very much to Eldon's annoyance, under the 53 Geo. III. c. 24.

Before that event, other legislation had supervened. By the Act of Settlement (12 & 13 Wm. III. c. 2), it was provided that "no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a Member of the House of Commons." 4 & 5 Anne, c. 8, repealed this provision and substituted for it a section rendering, as from the dissolution of the then existing Parliament, any person "who shall have in his own name or in the name of any person or persons in trust for him or for his benefit any new office or place of profit whatsoever under the Crown which at any time hereafter shall be created or erected" incapable "of being elected or of sitting or voting as a Member of the House of Commons."

The Succession to the Crown Act, 1707 (6 Anne, c. 7), repealed and re-enacted this section of the Act of 4 & 5 Anne, defining "new office or place of profit" as one "which at any time since the five-and-twentieth day of October in the year

of Our Lord One thousand seven hundred and five have been created or erected or hereafter shall be created or erected." XVII.

Thus the struggle of the seventeenth century concentrated mainly upon the judicial independence of the judges; the statesmen of the early eighteenth century devoted their efforts to an endeavour to secure the independence of Parliament.

Such was the position when Montesquieu examined it. His brilliant generalisation on the subject of the Separation of Powers may have misled the framers of more than one constitution on more than one side of the Atlantic. Yet, in one matter at least, he did not err: "Il n'y a point encore de liberté si la puissance de juger n'est pas séparée de la puissance législative et de l'exécutrice. Si elle étoit jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens seroit arbitraire; car le juge seroit législateur. Si elle étoit jointe à la puissance exécutrice, le juge pourroit avoir la force d'un oppresseur." [1]

Montesquieu has had no more searching critic than that venerable jurist, Professor Dicey, who has so lately passed from among us. Yet, says Dicey: "Upon the degree of authority and independence to be conceded to the Bench depended the côlour and working of our institutions. To supporters, on the one hand, of the prerogative who, like Bacon, were not unfrequently innovators or reformers, judicial independence appeared to mean the weakness of the

[1] *L'Esprit des lois*, edition 1821, tom. iii. p. 418.

XVII. executive and the predominance throughout the state of the conservative legalism which found a representative in Coke. The Parliamentary leaders, on the other hand, saw, more or less distinctly, that the independence of the Bench was the sole security for the maintenance of the common law, which was nothing else than the rule of established customs modified only by Acts of Parliament, and that Coke in battling for the power of the Judges was asserting the rights of the nation; they possibly also saw, though this is uncertain, that the maintenance of rigid legality, inconvenient as it might sometimes prove, was the certain road to Parliamentary sovereignty." [1]

Meanwhile, the general trend of legislation followed the constitutional precedents of the seventeenth century. Thus 7 Geo. II. c. 10 excluded the Scottish, and 1 & 2 Geo. IV. c. 44 excluded the Irish Judges (and amongst them the Irish Master of the Rolls) from the House of Commons. In England no similar provisions were necessary as regards the existing Judges, because they were, with the exceptions noted, already excluded by the resolution of 1605. As regards newly created judicial offices within the meaning of the Succession to the Crown Act, they were excluded by the operation of its 25th section. It is curious to notice that Lord Brougham, whose opinions on the policy of this matter were impeccable, was most unaccountably faulty in his memory of the actual facts. Writing in 1862, he says, "The Vice-Chancellor or the

[1] *Law of the Constitution*, 8th ed. p. 224.

new Judges in Bankruptcy, the Judge of the Court of Admiralty, and the Masters in Chancery have all in late years been forbidden to sit in the Lower House." At the time when he wrote there were no Masters in Chancery, for they had been abolished ten years before, and they had remained eligible to sit in Parliament so long as they existed. As regards the Vice-Chancellor of England (53 Geo. III. c. 24), the other Vice-Chancellors (5 Vict. c. 5, 14 & 15 Vict. c. 4, and 15 & 16 Vict. c. 80), and the Lords Justices of the Court of Appeal in Chancery (14 & 15 Vict. c. 83), the Statutes creating their respective offices were silent as to their sitting in Parliament, because the Statute of Anne rendered it unnecessary. XVII.

As regards the Judge of the Admiralty Court, however, Lord Brougham was accurate. In 1833 a very strong Select Committee of the House of Commons enquired into the office and duties, etc., of the Judges of the Prerogative Court and of the High Court of Admiralty, the Dean of the Arches, and the Judge of the Consistory Court. It included among its members Sir James Graham, Sir Robert Peel, Sir James Scarlett, Campbell (afterwards Lord Chief Justice and Lord Chancellor), and many other well-known members of the House. Among the witnesses examined before them was Mr. (afterwards Sir John) Nicholl, himself a member of Parliament and a member of the Committee, who was at the time Dean of the Arches, Judge of the Prerogative Court, and Judge of the Admiralty Court. He was asked the following questions:

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Do you think there would be any objection to rendering the office of those Judges incompatible with a seat in the House of Commons? My own feeling, after sitting in Parliament above thirty years, is rather against Judges sitting in the House of Commons, I confess.

Might there not arise cases in which there might be debates in the House of Commons on matters which come judicially before one of those Judges? Certainly.

You would consider that to be an inconvenience? I should think so.

Thereupon the Committee, without hearing any further evidence upon the point, recommended that the Judge or Judges should not be capable of sitting in the House of Commons, and effect was given to this recommendation by the Statute, 3 & 4 Vict. c. 66, passed on the 7th August 1840.[1]

There, but for an incident to which I must call attention hereafter, the matter rested until 1873, when the same statute which rendered the Master of the Rolls incapable of sitting in the Commons, placed the incapacity of the other Judges upon a statutory basis.

The next event to notice is the passing of the Municipal Corporations Act, 1835. It is impossible to exaggerate the confusion which existed at that date in the administration of criminal justice in the Boroughs. Some towns had Borough Sessions without Recorders; some had Recorders but no Sessions; some Recorders had no legal qualification; some of those who were required by Charter to be learned in the law were deemed to satisfy that requirement by being peers, and therefore Judges; some had legal qualifica-

[1] *Report of the Select Committee on Admiralty Courts*, vol. vii., dated 15th August 1833, at p. 401.

tions but never sat at Sessions; some were appointed by the Crown, some by the Corporators, some by a select few among the Corporators, some by the lord or lady of the manor; some of the Recorders combined with that office that of Town Clerk; some of the Sessions had jurisdiction in capital offences; some exercised such a jurisdiction for years without discovering that they did not possess it by law.

Into this chaos the Act of 1835 introduced a certain amount of order. The Report of the Royal Commission, whose labours preceded the preparation of the Bill, is a mine of curious legal antiquities. The Act itself is one of the most solid legislative achievements of the law reformers of the early nineteenth century. On its legal side it vested the patronage of the office of Recorder in the Crown, and required the Recorder to be a barrister of not less than five years' standing, holding his office during good behaviour, and bound to sit as sole Judge at Borough Sessions at least once in every quarter. To meet one of the worst evils disclosed by the Report of the Commission, the Act forbade the Recorder to be an alderman, councillor, or police magistrate for the Borough. The framers of the Act were then constrained to deal with the question of Recorders sitting in Parliament. It was obviously impossible to render every Recorder ineligible everywhere. Such a provision would have limited the choice by the Crown of suitable people for the office to those members of the Bar who had no Parliamentary ambitions. The amount of time which the Recorder is bound

XVII. to give to his duties in any year is necessarily short, and the salary is proportionately small. On the other hand, the dangers incident to a combination of the Judge and the politician in one personality are greatest when the Judge's duties are mainly criminal. In this dilemma, the legislature in 1835 adopted a compromise, enacting that the Recorder should not be eligible to serve in Parliament for the Borough for which he acted as Recorder. This arrangement has worked reasonably well ever since. It will be remembered that as the Municipal Corporations Act did not apply to the City of London, the Recorder of London was unaffected by it. His appointment remained with the Court of Aldermen until 1888, when the Local Government Act in effect required their choice to be approved by the Crown, and he remained capable of sitting in Parliament.

Next came the County Courts Act, 1846, which created the County Court Judges. By some accident that Act did not prohibit a Judge from sitting in Parliament. This error was rectified by an Act of the following Session (10 & 11 Vict. c. 102) which declared that no Judge of the County Courts should be capable of being elected or sitting as a Member of the House of Commons, and did so although, until the County Courts Act, 1852, a Judge of County Courts was still allowed to practise at the Bar, except within the district "for which his Court is holden."

In 1853 this general current of legislation was rudely interrupted. In that year a worthy Irish

peer—Lord Hotham—thought he saw an opportunity for a useful piece of legislation which should complete the separation of the judiciary and the legislature. Lord Hotham was an ex-guardsman who had been wounded at Salamanca and had fought at Waterloo, and who, in 1853, had sat in the Commons almost continuously since 1820. His claim to permanent fame rests, not so much on his achievements as a soldier, or on the fact that before his death he had seen nearly forty-eight years of Parliamentary life, but that on this occasion he found a lion in his path, and provided the opportunity for the lion to give a loud and reverberating roar. Lord Hotham's Bill proposed to exclude from Parliament the Master of the Rolls in England, the Official Member of the Arches Court of Canterbury, the Master Keeper or Commissary of the Prerogative Courts of Canterbury and of York, and the Judges of the Queen's Court of Prerogative and of the Court of Admiralty in Ireland. Any one might have predicted an easy passage for it. It passed its Second Reading without a division. There were, it is true, certain ominous indications upon the Second Reading Debate that the Whig Government would have liked to defeat the Bill if they had dared; but the Tories, led by Sir John Pakington and Sir Fitzroy Kelly, and the Radicals, led by Mr. Hume, were in alliance, and it was very difficult for the Whigs, against whom the opinions of such eminent members of their party as Lord Brougham and Lord Langdale could be and were quoted with effect, to force the House to a division. Sir John Pakington

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XVII. and Mr. Hume widened the Bill by including in it the Recorder of London. The Committee stage was peaceful. But when Third Reading was reached, an orator had been found who did not intend to seek re-election to Parliament, and who was very glad to express forcibly and openly the objections which his party felt to the proposals of the Bill. Macaulay was actuated by personal as well as public reasons. The truth was that it was mainly on personal grounds that the Bill was objectionable to the Whigs.

The Master of the Rolls in 1853 was Sir John Romilly, a member of an old Whig family, whose somewhat chequered Parliamentary career lent considerable point to criticisms based upon the incompatibility between the judicial office and submission to the suffrage of the electors. He had been originally elected for Bridport in 1832, and defeated for that constituency in 1835, after a very sharp contest, by 8 votes. In 1846, he was again elected for that constituency, but only after a scrutiny. In 1847, he was elected for Devonport. He became Lord John Russell's Solicitor-General in 1848, Attorney-General in 1850, and Master of the Rolls in 1851, and lost his seat at Devonport at the General Election of 1852. On that occasion his conduct was such as to cause considerable criticism. "Your Lordships may recollect," said Lord Chancellor Cranworth, speaking in 1856, "that at the last General Election my learned friend the present Master of the Rolls was a candidate, and great scandal was supposed to exist among some persons by his canvassing voters in a way that was by some

persons thought not consistent with the high public functions which he is called upon to exercise." Thus Macaulay had an opportunity of striking a blow for a personal friend and a political ally. XVII.

He had, it would seem, another motive—half personal, half political. Any proposal to exclude Judges from the Commons could always be met by the tit for tat, "Why don't you exclude them from the Lords?" and in particular by the retort which has been employed in the later stages of the controversy, "What about the Lord Chancellor?" This form of argument was particularly effective in 1853, when the judicial business of the House of Lords was, to say the least of it, not well managed. It was also particularly effective in the mouth of a Whig, who disliked the hereditary principle, to meet an attack by a Tory who was pledged to its support. The objection of the Whig and Liberal parties to the appellate jurisdiction of the Upper House was, with them, almost a matter of principle. It played its full share in the debates on the Wensleydale peerage and in the numerous attempts of the 'sixties and early 'seventies to reconstruct our system of judicature. In the end, it came near to wrecking Lord Selborne's great Judicature Bill, and it was only set at rest by Lord Cairns' Judicature Act of 1875, and by the Appellate Jurisdiction Act of 1876. It is the settlement arrived at in consequence of those two Statutes which is at risk if the opinions expressed by many noble Lords in March last are pressed to the extreme. Upon the Third

XVII. Reading Debate of Lord Hotham's Bill, Mr. Drummond moved that it be read this day six months, speaking "tersely and keenly." That veteran Tory, Sir Robert Inglis, seconded the motion. Then Macaulay rose. No doubt his speech made a great stir and had a great effect at the moment, and, to judge by the many references to it which have been made during the present controversy, it has had a long influence upon men's minds. The immediate effect was described in an article in a contemporary newspaper, quoted in Sir George Trevelyan's Biography of his uncle. The romantic circumstances in which the speech was delivered (for it was Macaulay's first speech after his return to Parliament in the previous year, and it came after a long period of illness), the striking result, the rejection on the Third Reading of a Bill which had reached that stage without a division, the sonorous language and the striking delivery, made it noteworthy and memorable. But, in truth, to any close student of the situation, the result ought not to have been surprising, for the majority of the House in their hearts did not wish the Bill to pass. The effect produced was in no sense permanent, for, as Sir George Trevelyan points out twenty years later, that portion of the Judicature Bill which finally excluded the Master of the Rolls from the House of Commons was carried on the motion of a Liberal Minister "without opposition and without discussion. 'Clauses 9 to 11, inclusive, agreed to,' is the sole notice which Hansard takes of the proceedings which reversed the decision of 1853."

Furthermore, Macaulay's arguments were little more than dialectic. He began by reciting the famous men who, as Masters of the Rolls, had sat in the House of Commons. Then he proceeded to an argument with which we have once again become familiar, that this was "the most homeopathic dose that ever quack proposed for the widest-spread malady." If you are to exclude the Master of the Rolls, why not all the Recorders and all the Chairmen of Quarter Sessions? Then he proceeded to another argument now familiar. Why is the Master of the Rolls to be excluded from the House of Commons and allowed to sit in the House of Lords? Why, indeed, are all the members of the House of Lords to be allowed to exercise judicial functions? Think of the political power wielded in that assembly by Hardwicke, Mansfield, Thurlow, Eldon, Brougham, and Lyndhurst. Then, again, he referred to the original attempt at the Revolution to exclude from the Commons all persons holding office under the Crown, and pointed out, with perfect truth, the disastrous consequences which would have followed had that enactment come into operation, both upon the composition of the lower House and upon the whole constitutional situation in the country. He endeavoured to controvert the argument based upon the impropriety of a Judge in indulging in contested elections and subsequently engaging in a party struggle in the House of Commons. "Party struggles, no doubt, there always will be; but there is an abundant and extensive province of Parliamentary labour that lies quite

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remote from the contentions of parties, and in which a great jurist can render immeasurable and inestimable service, and obtain for himself an imperishable name."

Lastly, having for the most part argued the case by means of a series of dilemmas, he found himself forced to adopt the proposition that "any Judge who is properly elected should be admitted into this House except where there is some plain reason why that Judge should not come in here." He saw the consequences of this absurd dogma, and at once cut it down by exceptions so large as to leave it practically harmless. "The plain reason" for excluding the fifteen Judges was to be because you cannot "continue the House of Lords as a great Court of error, unless they are assisted by the fifteen Judges; those Judges have consequently seats in it, and there you must leave them, for it would be inconsistent with the privileges and dignity of this House to have any Member here who is at the beck and call of the other House." The Irish and the Scottish Judges are to be excluded because they obviously cannot both sit in Scotland or Ireland and in the House of Commons at the same time.

Many of the fallacies of this argument are patent. Jekyll, Strange, Kenyon, Pepper Arden, Grant, Leach, Copley, Pepys, and Romilly would have been equally great Masters of the Rolls had they never sat in the House of Commons. In the careers of some of them there are incidents which would not have occurred had they been absent from the House, and which do not increase their fame as men. Furthermore, it is not true

of all of them that they engaged solely in any "province of Parliamentary labour remote from the contentions of parties," and not true of any of them that as great jurists they rendered immeasurable and inestimable, or indeed any particular, service while they held their seats. xvii.

Again, the sound argument deduced from the legislation as to the exclusion of statesmen has no relevance to the position of the Judges. The reason why the British constitution works reasonably well is that the Ministers of the Crown are present in Parliament to answer there for the advice which they tender to the Crown and for their own actions, and, if the first thoughts of the statesmen of the revolution had remained law, they would have been separated from the popular assembly and as secluded as is the President of the United States. In the exercise of the judicial function, there is no room, if that function is to be exercised impartially, for pressure by or fear of the popular assembly. Those are the very things against which the Judges by universal consent must be protected. It might be better for the form of our laws if all the Judges were occupied during their evenings in earning immeasurable fame by correcting the draftsmanship of the other members of the House of Commons. But other results would follow which the common sense of generations has refused to contemplate.

When, however, Macaulay based his argument on the position of the House of Lords as the Supreme Appellate Tribunal, he was on safer ground. In those days the judicial work of the

XVII. House was performed by the Lord Chancellor and any ex-Lord Chancellors who happened to survive, assisted by such peers as Lord Langdale, while he was Master of the Rolls, Lord Kingsdown, or Lord Campbell, before he became Lord Chief Justice. The heads of the Common Law Courts often held peerages, but their judicial duties in Westminster Hall prevented them from taking any regular part in the judicial work of the House of Lords.

There also remained the curious anomaly that in theory every member of the House of Lords was competent to sit as a member of the Appellate Tribunal. It is true that the practice did not correspond with the theory. Since the case of O'Connell *v.* The Queen (1844, 11 Cl. & F. p. 155), no lay peer has taken an effective part in the judicial proceedings of the House; and indeed for many years before that date, although the right of the lay peers to do so remained unquestioned, the occasions upon which it was exercised were very few in number. The cases are collected at the close of the report of O'Connell *v.* The Queen at p. 425.

The proceedings in that case deserve most careful consideration by those who, finding no written prohibition against an evil practice, claim that no rule or convention exists upon the matter. The circumstances in O'Connell *v.* The Queen were embarrassing, and the course of the proceedings was such as seemed likely to provoke intervention by the lay peers, unless they could be restrained by arguments based rather upon general convenience and general custom than

upon the merits of the case before the House. O'Connell and his associates were indicted in Ireland upon a number of counts for treasonable conspiracy, were tried at Bar in the Irish Court of Queen's Bench after a challenge by them to the array, and were convicted. XVII.

They moved for a new trial on the ground of the admission of illegal evidence, and failed.

They then moved in arrest of judgment in the same Court and were refused.

They then sued out writs of error in Ireland and again failed, and they then brought writs of error in Parliament.

The grounds for the appeal were based in part upon the challenge to the array—it being alleged that the jury list "had been fraudulently and illegally made and contrived for the purpose of prejudicing the defendants in their trial"—and in part upon purely technical pleas.

The legal Lords before whom the proceedings in error were heard were the Lord Chancellor (Lord Lyndhurst), and Lords Brougham, Denman, Cottenham, and Campbell.

The Judges were summoned and their advice was requested on eleven questions. Upon nine of these questions unanimously, and upon two by a large majority (though it should be noticed that the minority included Baron Parke), the Judges upheld the judgment below. Of the law Lords, the Lord Chancellor and Lord Brougham were for sustaining, Lords Denman, Cottenham, and Campbell for reversing, that judgment.

Having regard to the position which Brougham had assumed since Lord Cottenham entered upon

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his Chancellorship, this division of opinion proceeded upon purely party lines, though each of the peers who took part in it veiled his political prejudices or animosities with a decent show of black letter learning.

The situation then was this, that a Tory majority in the House of Lords saw a judgment, obtained against one whom they regarded as a factious and dishonest traitor, about to be reversed on purely technical grounds by a majority of three law Lords to two, after the Courts in Ireland and the Judges in England had, by great majorities, pronounced the proceedings to be regular. It is not to be wondered at that the lay peers desired to exercise their unquestioned right to vote. Accordingly, when the Lord Chancellor put the question, and the three law Lords had answered "Content," "one or two other peers" joined with Lord Brougham in saying "Not content." The Lord Chancellor abstained from making any "declaration of what he considered to be the opinion of their Lordships. After a pause of some moments, the noble and learned Lord again put the question in the same terms, and with the same result."

In the moments that followed the whole question of whether the House of Lords should continue to exercise the functions of the Supreme Appellate Court was in effect decided. If those two or three Lords who had said "Not content" with Lord Brougham had persisted in their action, it is scarcely possible to conceive that public opinion would have allowed the judicial jurisdiction of the House to continue.

The tactical situation was awkward. It may be doubted whether the lay Tory peers would have responded to an appeal from a law Lord. Fortunately there was at hand one who was a layman, a Tory, and well known as a seeker of peace. Lord Wharncliffe in the perilous times of the Reform Bill had endeavoured, though vainly, to persuade his party to accept the inevitable. Now

> τοῖς ὁ γέρων πάμπρωτος ὑφαίνειν ἤρχετο μῆτιν
> Νέστωρ, οὗ καὶ πρόσθεν ἀρίστη φαίνετο βουλή·
> ὅς σφιν ἐϋφρονέων ἀγορήσατο καὶ μετέειπεν.

He begged his lay colleagues to abstain from taking any further part in the proceedings. "If," he said, "departing from what the practice has ever been, noble Lords unlearned in the law should interfere to decide such questions by their votes, instead of leaving them to the decision of the law Lords, I very much fear that the authority of this House as a Court of Justice would be very greatly lessened throughout the country. . . . It is far better that the character of this House as a Court of law should be maintained, even though the decision should, in the opinion of your Lordships, be objectionable, as being contrary to that of the Judges, and although it should prove inconvenient in this particular instance."

Lord Brougham—his impish spirit for once subdued by the gravity of the occasion, though not so far as to prevent him from describing the decision as one "which will go forth without authority, and come back without respect"—seconded Lord Wharncliffe's appeal.

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Lord Campbell put the appeal upon a different ground. He affirmed—anticipating the mischievous doctrine preached by Lord Finlay—that such a distinction as Lord Wharncliffe had made "is not known to the Constitution." Nevertheless he thought that no one ought to vote who had not attended to the arguments in the case and he believed that none but the law Lords had done so.

Lord Lyndhurst then expressed the opinion that the Lords who had not heard the arguments would decline to vote if he put the question again.

Thereupon Lord Stradbroke said that he had considered the subject most attentively and was desirous of giving an opinion with respect to it.

Lord Clanricarde said that if any noble Lord, who had not heard the whole argument, voted, he should as a matter of privilege think it his duty also to give his vote, but he thought it infinitely better that all those noble Lords who "are not, in the common acceptation of the term and in the usage of Parliament, qualified to decide, should leave the House." Lord Verulam agreed with him, and all the lay peers then retired. The danger point was passed.

No rule or convention had existed before O'Connell's case, whereby lay peers were disabled from taking part in judicial proceedings. That case did not establish any such rule or convention, in the sense in which Lord Finlay and those who think with him look upon rules or conventions. It is unthinkable that at the present day any lay Lord should endeavour to exercise such a right. Yet, if any such peer were so ill advised

as to do so, I and those who think with me (and among them I am sure Lord Finlay would be reckoned) could not point to any Standing Order or any other written document to bar the right. We could only appeal—as we appealed upon the present occasion—to the common-sense of the most practical and business-like of assemblies, sanctified by long use, and I am sure that we should not appeal in vain. XVII.

Though the incident which I have described removed once and for all the danger that the legal decisions of the House of Lords might be weakened by the intervention of laymen, a further peril remained, owing to the numerical weakness of the legal peers and the difficulty of always finding distinguished lawyers whose family circumstances would enable them to accept a hereditary peerage. Lord Campbell indeed—when it suited his purpose—argued that it was rather an advantage than otherwise that there should not be more than two law Lords in the House at the same time, and appeared to regard the time, when Lyndhurst and Cottenham were alternately Chancellors, and Brougham and Campbell himself made up the Court, as a golden age, while he felt himself compelled by duty to warn the House of the inconvenience which might arise to themselves "from the intervention of a horde of legal peers. . . . From their morning wranglings you may secure yourselves by absence, but it must be remembered that . . . they will be entitled to bring forward whatever Bills or Motions they please, and to take a part in debate on all subjects, political, ecclesiastical, military,

XVII. or commercial. Now, my Lords, I have a great respect for my own profession, to which I owe so much; but there may be too much of a good thing. . . . I am filled with apprehension at the prospect of a Parliamentum Doctissimum or perdoctum."

Lord Lyndhurst actually committed himself to the proposition that the conferment of a peerage upon Sir James Parke would be of no assistance at all. "You do not want a Common Law Judge in this House. He is conversant only with that part of the administration of justice in this House in which you are most efficient and want no assistance."

This was in the debates upon the Wensleydale peerage, when in 1856 the Government endeavoured to strengthen the legal side of the House by the creation of a life peer. The attempt failed, and, having failed, was succeeded by an endeavour to make use of other remedies, which would involve the abandonment by the House of Lords of its judicial jurisdiction. One of these attempts actually passed into law in 1873; and though the Judicature Act of that year still left the House invested with the Scottish and Irish jurisdiction, it was inevitable that that jurisdiction would, when the Act had once come into operation, speedily follow the English jurisdiction. That attempt also failed, though when the eleventh hour had passed and the Act was on the Statute Book. Then came Lord Cairns' Act of 1875 which restored the jurisdiction and rendered inevitable the Appellate Jurisdiction Act, 1876.

That Act gave to the Crown by Statute the right of creating peers for life which the Crown had endeavoured to exercise upon prerogative alone in 1856, and it did so expressly "for the purpose of aiding the House of Lords in the hearing and determining of appeals" (section 6). Furthermore, it required that an appeal should not be heard and determined by the House unless there were present three Lords of Appeal, and it defined Lords of Appeal as meaning the Lord Chancellor, the Lords of Appeal in Ordinary to be appointed under the Act, and such peers of Parliament as are for the time being holding, or have held, any high judicial office as defined by the Act. The number of Lords of Appeal in Ordinary to be appointed immediately was two, but provision was made for the appointment of a third and a fourth such Lord of Appeal upon the retirement of certain judicial personages named in the Act. The first two Lords of Appeal were Lord Blackburn and Lord Gordon, and the contingent vacancies contemplated by the Statute occurred in 1882 and 1891, and were filled respectively by the appointment of Lord Fitzgerald and Lord Hannen. But even then the number of legal peers available was insufficient for the proper despatch of the business of the House of Lords and of the Judicial Committee, and in 1913 a further Statute gave power to appoint a fifth and a sixth Lord of Appeal, the persons selected being Lord Dunedin and Lord Sumner. XVII.

The story would be incomplete if I did not add that the confidence felt by the community

XVII. in the House of Lords as a Judicial Tribunal is great; and the number of cases which come to the House has been so large that even with the six Statutory Lords of Appeal, the Lord Chancellor and the ex-Lord Chancellors, it would be almost impossible to cope with the business were it not for other assistance. From time to time eminent lawyers, who have rendered long service to the State in a judicial capacity, or who, after practice at the Bar, desire to be relieved of its daily labour, have been distinguished by the grant of hereditary peerages and, being thus qualified, have formed an essential part of the Court. Thus we have at the moment, in addition to the Lord Chancellor, the ex-Lord Chancellors, and the six Lords of Appeal, and excluding the Lord Chief Justice of England and the Master of the Rolls, whose time is fully occupied in their own Courts, a body of some four or five peers to whom either the House of Lords or the Judicial Committee can look for assistance.

Twenty-two peers in all, including the six who now hold office, have been appointed under the Act of 1876 and its amending Acts. Nearly forty-six years have passed since the first appointment. Some of these Lords of Appeal had in a previous state of existence taken an active part in politics. Three had served in the office of Attorney-General and two in the office of Solicitor-General in England, one of the latter having also filled the position of Home Secretary. Five had been Lord Advocates; four had been Attorney-Generals for Ireland, one of these having subsequently held the same office in England. Two

had been members of Parliament but had never held office. Seven had never sat in Parliament or taken any prominent part in political affairs. The vast majority, therefore, of the Lords of Appeal in Ordinary have been sound party men. It might have been expected, if they held their seats subject to no rule or convention which forbade such a course, that they would have been as forward to support their respective parties in the House of Lords as any lay peer, and would have taken in the political struggles of the Upper House the prominent part which their great abilities and their long training in political warfare amply qualified them to fill. Had they desired to do so, they might, like those who spoke in the debates in March, have pointed to the examples of Ellenborough or of Cairns. They lived in stormy times. Political controversy has never been more bitter than when the alterations in the franchise brought the two Houses to acute division in the 'eighties, or when Mr. Gladstone's conversion to Home Rule broke up the Liberal Party, or when first the education controversy and then Mr. Lloyd George's budgets led to the Parliament Act. XVII.

Through all these storms, the Lords of Appeal in Ordinary were silent. Isolated instances may be cited to the contrary, but they serve only to emphasise the general rule. It is impossible to point out the moment at which the rule became operative. The convention seems to have sprung into existence with the first operation of the Statute.

It is this very fact which made it possible in

XVII. 1913 to increase the numbers of the Lords of Appeal. The public mind had by then acquired a complete confidence in the impartiality as well as in the learning of the Supreme Tribunal. Note had been taken of the fact that those who had been politicians had put off the habit of controversy when they reached this House, as completely as if they had been raised to the Bench of the Supreme Court or had entered the College of Justice in Edinburgh. And this was almost more important as regards the duties which the Lords of Appeal performed upon the Judicial Committee than as regards their duties in the House of Lords. The questions which come to the House of Lords seldom touch a political issue, and in this country we are so well accustomed to the impartiality of the Bench, that men are slow to attribute to a Judge the habit of indulging in personal prejudice. But the personalities of those who sit in Downing Street are known throughout the Empire only through the reputation which they gain at that Tribunal; and to it there come constitutional questions of vast import, the decisions on which touch the lives of our fellow subjects beyond the seas in the enjoyment of their political privileges and the exercise of their religion. These questions must be debated before men whose position and whose conduct forbids any one to suppose that in dealing with matters before them they look to anything but the intellectual problem presented.

Very recent history—indeed the history of the very debates from which this discussion originated

—furnishes an example. Irish Appeals, when the constitution of the Free State is fully established, will go to the Judicial Committee. Out of six Lords of Appeal in Ordinary three committed themselves during those debates to a definite expression of opinion upon the matters at issue. No one who knows any one of those of my noble and learned friends supposes that, because he holds this view or that view upon the Irish Treaty, he would therefore be biassed when he came to deal as a Judge with questions arising under it. We cannot expect that such an opinion should be entertained by persons who do not know them, above all by persons who have only recently begun to shake themselves free of a general spirit of suspicion of our institutions. XVII.

Yet, the Lords of Appeal in Ordinary, though silent until recently upon political controversy, have constantly given to the House of Lords their best advice in matters on which they are most competent to advise. The way in which our business is conducted, the readiness of the House to listen to any one who is specially fitted to speak on any question before it, the long experience of most of the peers, which enables them quickly to judge how far a speaker is so qualified, all these things give to the Lords of Appeal a special position in the House, and enable them to do, and to assist the House to do, invaluable work in dealing with the juridical matters which come up in debate. This strength is increased rather than diminished, by the fact that they abstain from general controversy. Hence it is that any measure touching the

XVII. administration of the law receives a fuller and a wiser treatment here than conditions of debate allow in the House of Commons, and that this House has been able to initiate and to discuss far-reaching measures of reform without any tinge of party feeling.

It may be conceded that this practice in some respects leaves the House the poorer. No doubt the six peers who now hold the office of Lord of Appeal could give to the House on any topic, however controversial, the fruits of capacious and well-stored minds set out with all the force and grace of oratory. To be deprived of this is a small price to pay for the enormous advantage which is obtained from their assistance when they intervene in non-controversial matters and for the reputation of austere impartiality which they enjoy when they sit as Judges.

There remains the final argument—how then is the position of the Lord Chancellor and of the ex-Lord Chancellors to be explained and defended?

First, it must be said that of recent years the presence of the Lords of Appeal has enabled a new convention to be formed, namely, that neither in the House of Lords nor in the Judicial Committee should Lord Chancellors or ex-Lord Chancellors take part in judicial matters which affect even remotely affairs of State. Thus throughout the War the Prize Appeal Court was constituted so as not to include any one who had sat as Lord Chancellor. And next when there came up to the House of Lords during the War a plentiful crop of appeals on matters which concerned the

action of the executive Government, neither the Lord Chancellor nor the ex-Lord Chancellors took any part in them. This course would have been impossible if the Lords of Appeal in Ordinary had not been available to fill their places.

This arrangement, however, does not remove the theoretical anomaly. It is easy to frame and difficult to refute the academic arguments which can be directed against the position of the Lord Chancellor. In theory, constitutional doctrines forbid the union in one person of the office of a judge and the position of a statesman. The facts of history and the practical conveniences of our present system furnish a reply.

In the first place, as has been shown during the last 300 years, the continuous course of constitutional development, whether embodied in Statute or dependent on custom, has been to make and to widen the separation between the judiciary on the one side and the executive and legislative functions of Government on the other. With the exception of Lord Macaulay's Parthian fight and Pyrrhic victory, this development has been uninterrupted. Perhaps no one in modern times when framing a constitution would invent such an official as the Lord Chancellor, if they had no experience of our existing constitutional machinery. But 300 years of history, together with the fact that that history has been what it is, are the best justification for things being as they are.

In truth, in any constitution in which there is a separation of powers, there is always the danger that the powers thus separated may

XVII. collide. The Lord Chancellor is both the buffer and the link between the judiciary and the other supreme activities of Government. His utility in that capacity resides in the fact that he so acts both between the executive and the judiciary and between the legislative and the judiciary: that is to say, that he is not only at once a minister and a judge, but also a legislator and a judge. He could not combine these functions were it not that when the exercise of the executive power comes to be examined by the judiciary he can for the moment stand aside and allow the very great judicial personages, whom comparatively modern wisdom has created for the purpose, to bear the burden of that examination.

I have elsewhere examined the alternative solution, namely, that the functions of the Lord Chancellor should themselves be separated and that those which appertain to the executive and the legislative should be vested in a Minister of Justice. Put shortly, my objections to that solution are these. Our constitution being what it is, it is necessary that the chief legal adviser of the Government should be the chief representative of the profession of the law; that the supreme head of the judiciary should be a member of the Government; that he who has most influence in initiating and guiding the policy of the legislature in judicial matters should be a judge; and that he who is by his office the president of the College of Justice should also be he who has chief voice in the Cabinet and in Parliament upon juridical matters.

It must not be forgotten by those who hold

the contrary view that our judicial machinery and our juridical conceptions differ essentially from those of continental nations. A system in which the judicature is a branch of the Civil Service, and in which there prevails the idea of administrative law, may suit well, indeed may require, arrangements for control which differ from ours. But essentially the distinction is between a country where a statute operates upon a body of common or customary law, and one in which at a comparatively recent time a code has been set in the place of everything which pre-existed and remains, in theory at least, rigid and inflexible except by direct amendment by the legislature. XVII.

XVIII

A NEW PARTY

I.—The Bye-Elections and After

XVIII. The recent bye-election at Spen Valley has attracted great attention, but all the comments upon it have not been equally intelligent.

It is acclaimed by one as an immense triumph for Labour, by another as a supreme blow to the Coalition.

Rightly analysed it is neither.

It is not a triumph for Labour, for it will not be disputed that if the supporters of Colonel Fairfax and Sir John Simon had combined they could have defeated Mr. Myers.

It is not a supreme blow at the Coalition, because it has asserted, with a degree of emphasis which cannot be over-estimated, the final decease of the Liberal candidates for Parliament who withhold allegiance from Mr. Lloyd George.

Of such candidates Sir John Simon, with the exception of Mr. Asquith, was the strongest.

Of promising constituencies for such candidates Spen Valley was the most promising.

Sir John Simon was the first in the field by many days. He completely captured the whole

of the extraordinarily efficient local organisation which the late Sir Thomas Whittaker left behind him. XVIII.

Yet he altogether failed to defeat Labour, and did not very greatly exceed the total of votes recorded in favour of Colonel Fairfax—a stranger to the constituency and a novice in the arts of electioneering.

Spen Valley has many messages which are not encouraging to those who wish well to the Coalition; but it brings a knell of despair to those who dreamed that a future in English political life still awaited Mr. Asquith and his followers.

To-day this simple truth is unchallengeable. For a year after the election which swept them away not a single one of the leaders of that Party can offer himself for election to one constituency in these islands with the faintest prospect of success. One and all they must either join the Labour Party or join Mr. Lloyd George.

Some will do one, some will do the other, but in any event the result of Spen Valley may be expected to give ground for hesitation to those Coalition Liberals in the House of Commons who were faltering in their allegiance to the Prime Minister.

They may think that his umbrella is leaky, but they will not fail to observe that its shelter is dryer than the shower which is in progress without.

The Labour Party has much more legitimate grounds for elation than Spen Valley.

Bromley was important and full of warning to all who are not Communists. In its way, the

XVIII. Hertfordshire election was only a little less startling.

No one who is not wholly inattentive to the signs of the times will deny that there is a reasonable prospect that a Labour Government may be formed in this country within the next few years.

I by no means predict that it will. I merely point out that no one can dismiss the possibility.

A caution is very necessary, for many supporters of the Labour Party are talking as if the luggage of their leaders was already on its way to Downing Street.

Such is by no means the case. The Labour Party has up to the present made progress largely —though not exclusively—because no organised and powerful Party has been engaged in calling attention to its deficiencies.

First the War, and secondly the preoccupations which followed the Armistice, and thirdly the comparative unimportance up to the present of the leaders of the Labour Party, have prevented any detailed exposure of the innumerable weak points in their armour.

We hear, for instance, much of "Labour," little of "the Labour Party."

They can, if they choose, call themselves the Labour Party, but who gave them the right to talk as if they and they alone represented Labour?

Do they represent the millions of unorganised labourers who are not members of any trade union?

Do they represent the new women voters whom, with almost ill-concealed antagonism, they

are attempting to exclude from an equal industrial position with male trade unionists ?

Do they represent the discharged soldiers and sailors to whom to-day, in hundreds of cases, as an act of deliberate policy, they deny the opportunity of assimilating themselves among many of the most highly-skilled trade unions ?

And when we are asked to shiver at the prospect of an omnipotent Labour Party we shall not fail to ask the question, " *Under whose banner are our new leaders to rally ?* "

Will they be assembled in the respectable but somewhat drab tabernacle over which Mr. Arthur Henderson presides, or will they be found with red banners proclaiming our first Soviet beneath the statue of Nelson in Trafalgar Square ?

All these questions will be asked in the near future, and all will require an answer.

I am not among the number of those who believe that the Labour Party can be permanently excluded—or even for a long time be excluded—from its share in the Government of this country. Nor do I desire its exclusion.

But those of its leaders who think that the battle is already won are living in a fool's paradise.

The first elementary truth which they will do well to grasp is that with which I have already dealt—that they do *not* represent Labour as a whole, and that they *never will* represent Labour as a whole.

I can tell them that Mr. Winston Churchill, for instance, has won more elections than Mr. Smillie has lost in *Labour constituencies*. And the claim is no inconsiderable one.

XVIII. It may even be that Mr. Smillie's ill fortune in winning the approval of a majority of the electors in purely industrial constituencies accounts for his well-known preference for methods which are to-day only approved of in Bolshevist Russia.

These and many other considerations to which I may ask your leave to recur in later articles, will be urged upon the electors of these islands, and will certainly be considered by them before the day arrives in which we shall salute Mr. Robert Williams upon the Treasury Bench.

But they cannot, in my judgment, be successfully urged by an invertebrate and undefined body such as the present Coalition.

That instrument was of admirable value during the War. It has passed successfully through many great crises in the twelve months that followed the Armistice.

But it is as ineffective an instrument for the purpose of fighting our English Communists as it was an effective instrument for fighting the Germans.

The task of meeting the new Party in the political arena cannot be effectively discharged except by a single Party emerging with definite purposes and under one banner.

For such a task the formation of a National Party is, in my judgment, indispensable. Nor do I think it can long be delayed. The first condition which is necessary, if a political combination is to maintain its strength, is that it should be both organised and disciplined. Considerable analogy exists between parties and armies. ' With

loyalty and goodwill Allied Armies have successfully sustained the shock of battles in many campaigns. But they have always been at a disadvantage when placed in antagonism with a single and homogeneous enemy. It is not only in war that unity of command counts. However completely in agreement the members of a Coalition may be on matters of principle, they are always exposed to the suspicion that their policy is determined by a series of shifts and compromises. Now every Government, Coalition or not, must constantly compromise; but where a unified Government compromises, little or no adverse comment follows. When a Coalition compromises it is accused of bad faith. And such accusations, if generally or very largely believed, are a source of much weakness to Governments. XVIII.

I shall ask your leave in a future article to develop at greater length the reasons which have led me to this conclusion, the grounds upon which I think that the moment for the decision has arrived, and the general features upon which, in my judgment, the new National Party should be organised.

II.—The True Position of the Coalition

The series of somewhat obvious conclusions exhibited in the preceding paragraphs have attracted a degree of attention which must, on the whole, be pronounced excessive. For I wrote nothing, and predicted nothing, which ought to have caused the slightest surprise to any one

XVIII. who has studied with ordinary observation the trend of recent political developments.

Great Britain has now been governed by Coalitions for a period of nearly seven years. So far as I know every member of the Coalition Government is of opinion that the immense national problems which now await solution require the continued association, whether in office or opposition, of the men who have worked together under Mr. Lloyd George.

I know of none among my colleagues who is of opinion that the time has come or will ever come to revert to pre-war politics. And the reason is obvious.

Pre-war politics have disappeared. They no longer divide men's minds or afford the material for acute antagonisms. Look at the battle-cries at our modern by-elections! The rhetoric of the candidates and the attitude of the voters make it plain that we shall for the future travel paths more vital and more fierce than those of the past. For twenty or perhaps for fifty years our statesmen must busy themselves with entirely new problems, and the new electors will wave impatiently aside, as if they belonged to the Victorian age, those who try to marshal the dying forces of extinct controversies.

I cannot more clearly illustrate my meaning than by pointing out that I recall no single occasion, since I became a colleague of Mr. Lloyd George, on which any decision of the Government has marshalled Ministers upon the lines of their original political attachment.

This observation ought to dispose of much

of the foolish talk of the opportunism of the Coalition and of the impossibility of men who hold, as it is suggested, views fundamentally irreconcilable reaching decisions upon the basis of principle. XVIII.

No difference of political principle, in relation to the life and movement of the present, divides one section of the Coalition from its other sections.

These remarks are clearly elementary, and I make them only in order to draw inferences from them which are equally indisputable by any candid person.

If it be true that in the view of Coalition Ministers their association should be maintained, either in office or in opposition, they would be foolish indeed if they did not most carefully consider how that association could be made fruitful, effective, and successful.

There is only one way. Political parties, whatever be their genesis or their name, are maintained under democratic conditions in office and retain influence in opposition so long, and only so long, as they can excite enthusiasm and add to, or at least maintain, the number of their adherents in the country. Mere merit—even if it be assumed—never yet maintained the vitality of a political party. It is, therefore, axiomatic that if the Coalition is to remain powerful it must organise itself with a degree of thoroughness comparable to that which is shown by the parties, or the party, which challenge its existence.

And when I speak of the Coalition, I mean, of course, the Coalition reinforced, as it will be, by many men of moderate views, who will find

XVIII. themselves driven by the impulsion of the changes which lie in front of us to join its numbers and contribute to its strength.

Many such men are watching attentively to-day to see what happens to Mr. Asquith.

I observe that Mr. Asquith has taken some exception to the prediction I made not long ago that none of the leaders of his section of the Liberal Party could secure re-election.

Had I known that Mr. Asquith was able to stand for Paisley I should not have made this statement, for I have far too high a personal respect for him to wish to embarrass him at a critical moment. But I made the prediction, and it will stand, unless and until it is refuted by the event.

But even if the reputation and long public services of Mr. Asquith secure his return for Paisley, the general position will remain almost unmodified. His less important followers will be unable, lacking his advantages, to reproduce his success.

In this connection Lord Haldane's recent interview with the representative of the *Daily Herald* is full of interest. My noble and learned friend has thrown up the sponge with a vengeance. "The future," it seems, "is with Labour." Labour dwells upon the heights, wherever they may be. And through the whole interview the kindly but sombre tone is maintained of one who comes to bury Liberalism, not to praise it.

Lord Haldane's policy may perhaps be understood without the employment of a very exhausting analysis. He wishes to smother Labour

with kindness—or with brains. But I suspect that the brains of which he offers a rich endowment to the "High Tabernacle" are those of the old Liberal Intellectuals. Lord Haldane, looking upon the Labour Party as the Tiger, is not unwilling to repeat the risk of the young lady of Riga. It may indeed be conceded that the tiger, which would inconspicuously accommodate my distinguished and noble friend, would be a very large one. But perhaps this one is very large. XVIII.

Does any one think that adequate efforts are being made in constituencies to-day to defend the causes in which we believe? If he does, he lives in the clouds, and has no knowledge of the world in which, even at this moment, convictions, which will be pregnant with consequences, are being formed.

At this very moment when I write, young, plastic, and impressionable minds are drinking in false messages because these are the only ones they hear.

Look round at the constituencies of to-day. In every industrial centre the Socialists are busy. You will find them at the street corners of our large towns uttering, and indeed bellowing, economic sophistries. Often you will find at these meetings (I listened to one such a few nights ago) the whole existing basis of society most enthusiastically and plausibly assailed. The capitalist system, which can be defended by arguments both clear and intelligible, goes absolutely by default. Greed, envy, and malice are daily and nightly inculcated.

XVIII.

Does any one really believe that this new and untried electorate can be persuaded of a doctrine which, though it is sounder, is far less appealing, by organisations which in comparison with those of others are contemptible, or by exertions which lack the stimulus of a unified enthusiasm?

How is the Coalition meeting its enemies to-day? The leaders have in reality effected a fusion of view, but no simplification or adaptation has been attempted of their pre-war equipment in the country. Where there should be unity in the constituencies, alike of organisation and effort, there is disparity and misunderstanding. Where there should be one organisation there are two. The minds of the local organisers in the constituencies are still far too intent on maintaining a separate interest, which in the actual conditions of the moment has ceased to possess the slightest importance, to rally on behalf of a cause which will engage the rest of our lives, and upon the ultimate solution of which the greatness and even the existence of the British Empire depends.

Some of those who have criticised what I wrote have spoken as if I were hostile to the Coalition. Such a misconception is, of course, ludicrous.

I have been a member of every Coalition Government. I am responsible for everything that has been done and for everything that has been omitted. I say nothing of the events which preceded the election. History will judge of our part in that fateful period in the development of the world. But I make this claim, in relation to the twelve

months which have followed, that no Government in the history of this country has ever been confronted with a series of more bewildering and insoluble problems.

The demobilisation of the Army and the Navy, the resettlement of service men in civilian life, the Peace Conference, the financial problem, the police strike, the general spirit of hysteria and unrest which is rife in the community, the Irish tragedy, the situation of Europe, and of the world as a whole—all these have presented problems transcending infinitely in difficulty and in subtlety the problems of the War. For, during the War, if your mind was made up, all that you had to do was to organise everything in the nation which could be contributed to victory.

This was exhausting, but it was not complex. Tasks of the most infinite complexity await our Government in the next few years.

The individuals composing the present Coalition Government may or may not be as adequate (or as little inadequate) to these problems as the members of a different party able and willing to take their place. If the country decides not, they can be, and in due time will be, turned out. But they will most certainly be turned out if they expose themselves unnecessarily to inconveniences and disadvantages which have never confronted any previous Administration.

Given a fair opportunity, I am certain that the constituencies, as a whole, will pass judgment upon the achievements of the Government more generously than its opponents imagine, or than recent by-elections would suggest.

XVIII. I myself have no doubt that if a plebiscite were taken at this moment, of the British nation, in order to determine who should become Prime Minister of the country for the next five years, the choice would fall upon Mr. Lloyd George.

Can any one suggest another name? Would it be Mr. Asquith, Lord Salisbury, or Mr. Clynes; Mr. Ramsay Macdonald, Lord Robert Cecil, or Mr. Thomas?

I am satisfied that the community, as a whole, has formed a view of the resource, the courage, the resiliency, and, above all, the patriotism of the present Prime Minister, which is the greatest asset of the Coalition.

But if this be true, how ought the Coalition to set its house in order so that it may compete upon equal terms with its competitors?

As a fighting force in the constituencies, it is to-day, as I have already said, what every Coalition in English history has always been—it is invertebrate. It is ineffective in attack; it is unconvincing for the purposes of defence. It lets every case go by default.

In the old days the Unionist, the Liberal, and the Labour Parties all excited enthusiasms, and gained and retained ardent partisans. Workers in the constituencies find it hard to make the idea of a Coalition personal or real, in the sense of a party in whose behalf they may labour as they laboured for their several parties in the past. No one is specially concerned to defend it and every one is very specially concerned to attack it.

This state of affairs constitutes a grave menace to the State.

The Labour Party to-day is infinitely less united upon fundamental principles than the Coalition. Its extremists, who are very powerful, desire a complete subversion of the existing basis of society. It is only united for the purposes of attack; but it will most assuredly be able to combine in order to carry out schemes of Socialism which would destroy in twelve months the whole fabric of British credit.

That it is necessary to fight such a party would seem to me to be elementary.

I do not indeed require Lord Robert Cecil's admonition that it is absurd to form a party to fight Labour, but I affirm that it is necessary to form, upon the most effective lines available, a party which will resist the pretensions and the political aims of the present Labour Party.

Does Lord Robert Cecil deny this?

It is only necessary for me to add that in my opinion a coherent body of political doctrine exists which will enlist the support of the great majority of the country, and which may easily be brought into touch with the present and future requirements of the nation.

And the doctrines to which I refer are doctrines which, without any sacrifice of principle, could be embraced by those who at present support the Coalition.

It would indeed be a superficial error to underrate the strength of the appeal which, when the time comes, the leaders of the new party will be in a position to make to the constituencies.

XVIII. We have finally enfranchised the Nation. We were responsible for the fortunes of the Empire during the fateful and decisive years of the War. At the Peace Conference, whatever errors were made, we gathered for the Empire the fruits of victory. We carried the country, during the twelve months which followed the Armistice, through a period of crisis and unrest the degree of which is imperfectly realised to-day, but which was comparable in gravity to that which faced us in a critical year of war. We are now, amid incredible difficulties, addressing ourselves to the work of reconstruction upon lines which are not seriously challenged by any of our political opponents.

The country in my judgment has not forgotten, and will not forget, these exertions. But the record of achievement and the prospect of future effort will never be explained and made clear by divided organisations. Unity of command, unity of organisation, and unity of name are all indispensable.

If you are good enough to afford me the opportunity, I shall in the future, in a final article, attempt to state, in a series of generalities, the points which may serve as a rallying ground for the National Party of the future.

And may I perhaps close this article with a prediction?

The formation of such a Party may easily be postponed. It may be postponed too long. It may be called a National Party, a Constitutional Party, or a People's Party.

But even if it be postponed; by whatever

name it be called, all those who have criticised me, except those who belong to the Socialist Party, will within five years—in office or in opposition—find themselves, as I shall, among the roll of its members. XVIII.

III.—The Policy of a New Party

I said in my last article that I should attempt to collect in a final article a series of generalities which might serve as a rallying ground for the National Party of the future.

In such a case, if agreement be possible upon general principles, disagreement upon details is unlikely.

The first object which will occur to the mind of every thinking man is the maintenance of peace and the security of the Empire.

Urgent as are the domestic problems which crowd upon us, the experience of the last five years shows how inexorably mistakes in foreign policy here or abroad may affect the personal life of every man, woman, and child in the kingdom. We are, in the first place, I believe, determined not to fritter away the fruits of an immortal victory. The Treaty of Peace may be modified. Its substantial results must remain.

In the forefront, therefore, of the programme of the National Party I would put a sane foreign policy, the support of the League of Nations as the security for peace, the strengthening of good relations with all our neighbours—and especially with our Allies in the late War—and last, but not least, the maintenance of a Navy and an

XVIII. Army which will secure the Empire, should the League of Nations fail, against the possibility of successful attack from without.

There can be no substitute for the national spirit, even in the League of Nations.

In the last resort the Empire must look to itself, and it must never lose the habit of so looking.

The National Party, as I conceive it, is pre-eminently fitted to sustain such a policy. It will certainly have nothing to do with aggression. On the other hand, it will not be tempted by the crazy dreams of pacifists and Bolshevists to throw down the national defences or to provoke other nations into hostility by ambitious or ill-considered schemes for promoting international brotherhood according to the principles of the "Internationale."

Indeed, I can conceive of no more dangerous experiment than to entrust the complicated and highly dangerous business of international relations, impinging, as they do, on national prejudices and interests of a most intricate kind, to the inexperienced and slapdash methods of some of those who now pose as the leaders of the Socialistic Parties. Who could feel the slightest confidence in the future of the Empire if the Socialist Party were placed in power to-morrow? How much do the Shop Stewards care about the Empire? Mr. Clynes cares much and understands much. So does Mr. Hodge. But what will be the extent of their influence over the powerful and sinister forces which before our eyes are deriding alike the dynasty

and the Empire, which looks to the dynasty as the expression of its common personality? What would be the policy of the Labour Party in relation to the problems afforded to-day by India and Egypt? Is that Party prepared to support the claim of an Irish Republic? The truth is that at the present moment the Labour Party cannot declare, and could not carry out, a positive programme. It is strong only in opposition. Upon a policy of snarling criticism all can agree. There is little other agreement. XVIII.

What we in Britain want is not adventure abroad, whether it be capitalist adventure or Socialist adventure, but peace and sensible relations with all our neighbours throughout the world. And when I say all our neighbours, I do not exclude Germany. To expect Germany to pay indemnities, and at the same time to refuse to trade with her, is, of course, absurd.

In the second place, I would put the consolidation and development of the Empire.

The War has transformed the Empire. It is no longer a cluster of self-governing colonies and great dependencies centring about the Mother-country. It is, on the one hand, an association of free and equal nations, and, on the other, the greatest instrument for teaching democracy and progress to the backward millions of mankind that the world has ever seen.

It was the united British Empire that really won the War. Great Britain could never have carried the tremendous burden of war in France, in the Balkans, in Turkey, in Africa, and in Mesopotamia by itself.

XVIII. It was the splendid co-operation of Canada, Australia, South Africa, New Zealand, and India that made victory possible. We must not let the unity which thus preserved the liberty of mankind in war be dissolved in peace.

Yet if we are to do this the constitution of the Empire must be adapted to give the same measure of control and responsibility to the Dominions in its common affairs, on absolutely equal terms, as is enjoyed by Great Britain.

On the other hand, if we are to deal with the movements of unrest which manifest themselves among the less advanced races of the Empire, we must encourage a steady development both of democracy and responsibility among them, yielding neither to the appeals of those who would go too fast nor to the fears of those who would go too slow.

This great task I believe the National Party is also eminently qualified to perform. It will include in its ranks large numbers of people who have had a practical interest in Imperial affairs, who have taken their part in the work of government or in trade and commerce within its boundaries, who recognise the difficulties of the problem, and who will therefore not be caught by visionary dreams either of the rapid consolidation of the Empire or of the immediate possibility of self-determination among its backward parts.

The Authority of Parliament.—It will be the duty of the National Party most jealously to maintain, and even to increase, the authority and prestige of Parliament. In these strange days, and under our most comprehensive fran-

chise, influential men in the Labour movement are openly disparaging, deriding, and undermining the reputation of Parliament.. One tells us of direct action; another, even bolder, points to the Soviet as the instrument of the democratic will. XVIII.

It is necessary to hold very plain language in relation to such menaces. Unless democracy is a vain dream, the House of Commons is becoming more and more the perfect mirror of the constitutionally expressed desires of the nation. The adoption of Proportional Representation, most stupidly delayed and obstructed, will make it as perfectly representative of the constituencies as any Parliamentary Assembly can be. It will fall to the National Party to champion this free and great assembly against the forces, whatever they may be, which are either openly or insidiously attempting to undermine its influence and position in our constitution.

Next there is the question of Ireland. Of all problems there is none which it is more urgent to settle than the Irish question. It makes difficulties at home, in America, and in the Dominions.

In dealing with it, I would abide firmly by the three principles laid down by the Prime Minister in his recent speech on Ireland. First, that Southern Ireland must no longer be denied self-government; second, that the solid anti-Home Rule population of Ulster must not be forced under a Dublin Parliament against its will; and third, that the secession of Ireland or any part of Ireland from the British Empire must be resisted to the end.

XVIII. I believe that these principles will be accepted by all those who I think are likely to become members of the National Party. What effect can be given to them must, of course, depend in large measure upon local developments in Ireland.

The near future will show whether there is the slightest chance that moderate opinion in Ireland can even at the eleventh hour reassert itself. If it cannot; if the last word of an overwhelming majority in the South and West of Ireland is to be the pistol of the assassin, combined with a resolute adherence to the claim for separation, then indeed dark and bloody days await us. If the attempted settlement succeeds, the friends of this country will everywhere rejoice. If it fails, through no fault of ours, we shall resist secession as the United States resisted it—that is to say, to the last man and the last sovereign. And the test of our ability to maintain order in Ireland may well prove to be the test of our claim to be the trustees of civilisation in the world.

Finally, there remain all the questions which come within the compass or the phrase "domestic affairs."

Broadly speaking, I would say that the watchword of the National Party should be "reform," not "revolution," and "individual liberty" rather than "governmental control."

The Socialist Parties are so dissatisfied with the existing order of society that they consist largely of people in a hurry, who are zealous to smash the existing system before they have really

drawn up the plans for remodelling it. That is perhaps natural. XVIII.

Their leaders are largely men and women who have been in constant and poignant touch with the undoubted evils of the existing order—evils such as unemployment, low wages, high prices, bad housing, overwork, and so forth, which it must be the first object of the National Party to remedy.

But just by reason of the fact that they have been so close to the evils, they fail to realise how difficult and how complicated are the causes which have produced them, and how slow and how delicate the work of rebuilding must necessarily be if it is to produce better conditions in the end.

The Bolshevists have made their experiment in Russia. Whatever we may believe about stories of atrocities, one thing is certain: that practical experience has forced the Bolshevists to abandon most, if not all, of their idealist schemes for regenerating mankind.

Theories and ideals have a curious habit of dissolving in front of hard facts and human nature; and modern society has really grown out of the facts of the world and of human nature as we find them. No doubt many of these facts can be changed, though it will take time. No doubt, also, human nature can be changed, and can be improved, but that also takes time.

But if you start out to reform society while leaving facts and human nature the same, you will end by finding out that the new order in the end

XVIII. *bears a resemblance almost uncanny to the old, though it may be labelled in a different way.*

When the veil is finally lifted from Bolshevist Russia, I venture to prophesy that for all their sufferings; for all their struggles, things at the end will not be so different as we should expect from what they were at the beginning.

I am myself one of those who believe ardently in reform. There are countless things in this old land of ours which urgently require improving. We need better education, better agriculture, better transportation, better and more plentiful houses; and great, though sometimes disappointingly slow, steps are now being taken to provide these things.

But the question which overshadows all others for the moment is the industrial question, the problem of capital and labour, of bringing about an equitable distribution of the power and profits of industry between employer and employed, while keeping down prices to a level well within the reach of standard salaries and wages.

It is in this field that the National Party will have a special rôle to play as against the Socialist Parties.

There is no doubt that with goodwill and good organisation and hard work, we can give everybody a better time than they had before the War, and can mitigate the inequalities in wealth and power which lie at the root of so many of our industrial and social problems to-day.

As I have said, the National Party would stand for reform, reform as rapid as is compatible with safety, reforms along the lines we have

witnessed in the past three years, with its steady rise of wages, its Whitley Councils, and, as in the case of railways, the adoption of the principle of associating the employed with the management of the railways themselves. XVIII.

If only we could bring down prices—a matter which depends far more on foreign policy, and therefore upon the wise handling of our foreign relations, than anything we can do at home—the *condition of all classes of the people in this country would immediately become more prosperous.*

But the National Party would most vehemently resist the temptation which has beguiled Russia to try to bring about a millennium by revolutionary and catastrophic change.

It would endeavour to save the country from passing under the guidance of revolutionaries through that terrible wilderness of distress and disorder, for no object which could not be better obtained by more sober and less bloody means.

It would in particular resist the mad desire of the Socialist Parties to nationalise everything, to convert the whole nation into an army of officials debarred from enterprise, depending for promotion on higher officials, and controlled and regulated from morning till night.

There are certain national services which can best be nationally owned and run, but the vast mass of national business can best be conducted by the individual citizens themselves.

The ideal State is that in which the individual is so well educated and so self-sufficient a citizen that the life of the community runs itself with the least possible organisation from the top.

XVIII. That, at any rate, is the Anglo-Saxon ideal. The opposite is the German ideal, in which every citizen is organised for some function under the continual discipline of an army of red tabs.

It only remains to add a brief word upon the subject of tariffs. The general principle was clearly indicated by Mr. Asquith when he led the first Coalition.

We cannot and we will not repeat the errors of the past. We have reconquered economic freedom, recognising, as Mr. Asquith and his delegates at the Paris Conference realised, the errors and the tragic omissions of which we were guilty in pre-war days.

But we shall be honest enough to realise that the present collapse of European finance and the bewildering kaleidoscope of world exchange present a situation in which dogmatism is ludicrous, and a spirit of patient enquiry indispensable.

These, then, are the general principles upon which I think the National Party might be founded.

It would be a party combining many of the greatest traditions of our past with very noble aspirations for the future.

It would, above all, be a party whose programme would adapt itself to the natural desires and habits of the immense mass of our fellow-citizens, men and women, who are chiefly anxious to be allowed to manage their own lives in their own way, but are ready to take their full share in maintaining the honour and progress of their country and in promoting the well-being of their weaker or less fortunate fellow-citizens.

A LETTER FROM LORD BIRKENHEAD TO LORD AMPTHILL, WHO OBJECTED THAT THE TERM "NATIONAL PARTY" HAD ALREADY BEEN APPROPRIATED. XVIII.

21*st January* 1920.

DEAR LORD AMPTHILL,—I received the letter which, as Treasurer of the "National" Party, you addressed to me in Paris, and a copy of which has already appeared in the Press.

I was, I confess, genuinely unaware that the "National" Party had survived the General Election. You complain in a letter to the *Times* — I do not know how justly — of a Press boycott against your movement. It is certainly true that, whatever the explanation may be, I do not recall any reference to it in Parliament or in the Press since the last Election.

And, if I may say so without offence, the fortunes of the Party at that Election were hardly crowned with such a degree of success as would obviously entitle its members to the monopoly of a somewhat important English adjective. There are, I am now informed, in the House of Commons, at the present moment, two members of your Party, Brigadier-General Page Croft and Sir Richard Cooper. But my friend Sir Richard Cooper, though previously announced as belonging to it, did not, I believe, think it prudent to stand at the Election as a member of your Party. On the contrary, he ran—unless I am misinformed—as an Independent Unionist. I have no means of checking your estimate that 100,000 votes were given to your candidates in

XVIII. the course of the Election. But perhaps you can inform me whether the votes given to Sir Richard Cooper were included in that number? In any event, your claim, even if well-founded, would appear to be somewhat more modest than the title of your Party. It would, indeed, be a strange result if a Party represented by a single member in the House of Commons, and so far as I know by no member in the House of Lords, who takes part in the Debates of that Assembly, except yourself, could not only describe itself as a "National" Party, but could deny the name to a Party which might consist of hundreds of members of Parliament. To test the matter a little further, suppose that with the lapse of time the only two members of the National Party left in the whole country were yourself and Brigadier-General Page Croft. Would you still think it reasonable to deny to other and larger combinations the right to use the adjective "National" as descriptive of their aims? And you must allow me (again I hope without offence) to add, that it is no answer to this question to say that those who wish to call themselves members of a National Party can join your Association. They may dislike your organisation or your methods. I know nothing of either, so that I may indicate this risk without provocation. Equally they may prefer other leaders to yourself and Brigadier-General Page Croft.

I hope that you will forgive me if I do not answer the questions which you are so good as to put to me with reference to my views upon the points supplied to me under the name of

your policy. I have other opportunities which I prefer to use of making my views upon public matters plain. XVIII.

I trust that I have not given the impression in this letter that I attach undue importance to adjectives or labels. They have, in fact, considerable importance, but other matters, as you are well aware, are far more fundamental. I am sending this letter to the Press.

Yours sincerely,

BIRKENHEAD.

XIX

THE RECONSTRUCTION OF CIVILISATION

A Speech delivered in welcoming the Delegates at the Opening of the London Congress of the International Chamber of Commerce, on Monday, June 27, 1921.

XIX. Mr. Chairman, Ladies and Gentlemen, I attend here to-day, as you will have gathered from your Chairman's observations, to discharge a simple duty, and I shall discharge it with the brevity proper to one who speaks before those more detailed business discussions' take place which are of course the proper and primary concern of such a Conference as this. My duty is, on behalf of the Government of which I am a member, to afford a hearty welcome to all those gentlemen from other countries who at this moment have come to co-operate with our own business men in the problems which await and will presently receive your attention. The Government of this country most warmly welcome the presence of our foreign guests here for the purpose of this Conference, and will give every assistance that is in its power now or hereafter for the purpose of your discussions. It

would, indeed, be very surprising if the Government of this or any other country did not welcome with enthusiasm the contribution which you are willing to make—and, as we hold, are competent to make—to repair the existing situation of the world. I have made it my business to acquaint myself as far as I can with the credentials of those attending this Conference on behalf of the principal trading nations of the world. It is a circumstance of no small encouragement to those who would gladly draw a hopeful augury for the future from your discussions, that each of these nations is represented by so many men who in their own countries occupy business positions of the greatest influence and experience; and I am especially encouraged to notice that many of those who are present for the purposes of this Conference either occupy to-day or have occupied extremely influential positions in the work of their own national Chambers of Commerce, because, after all, the work which the International Chamber of Commerce has to perform is a work which will receive the greatest possible assistance from the labours and the experience which have been reached by each Chamber operating in its own country.

Now, what are the difficulties existing at this moment which have led to the constitution of an International Chamber of Commerce, and what are the services which, without undue optimism, we may reasonably hope that such a body may render, not to the Old World or to the New World, but to the world in its existing situation viewed as a whole? In the first place

XIX. it is a contribution which business men can make in a special degree, that in considering these matters they can divorce their minds from the many hampering considerations which necessarily restrict the outlook and in many ways actually curtail the activity of politicians or statesmen when they apply their minds to these affairs. The advantages which I think you possess over those whose primary functions are of a different character lie in the essential and proper difference of outlook. Business is not concerned, or not primarily concerned, with the distinctions between nationalities or colours or geographical conditions. It is quite true that in different stages of the world's history the more patriotic writers upon subjects of political economy have attempted to make the processes of business auxiliary to political or national objects. I confess I am of the number of those business men who believe—and in all ages there have been many of them—that the primary occupation of a business man is to carry on business, just as the primary occupation of politicians is to attend to politics. In my humble judgment the business of men who are devoted to affairs in the first place, and in all circumstances that can be called normal, has nothing whatever to do with international considerations, and that object is the best object which proposes to itself to increase the opportunities for the interchange of commodities, and to improve in the first place by every possible way the conditions in which those commodities are manufactured, and in the second place the various methods of transportation

available for those who are to be purchasers or customers. XIX.

Such, Sir, is the primary function, as it seems to me, of an International Chamber of Commerce. Such a body, in my view, could have discharged very useful functions before the world catastrophe of 1914. Its contribution to our post-war difficulties is not only useful but essential if the prosperity of the world is in the next decade—I might almost say within living memory—to be re-established at all.

What is the position in which we find ourselves to-day? It is, shortly, that, as a result of the devastating war through which the world has recently passed, whole areas of the world's surface, hitherto contributary to, and indeed forming a most material part of, the aggregate available markets of the world, have been withdrawn from the service of business, and that no substituted markets have been provided to take their place. I go further, for this statement does not exhaust the trouble. Not only have you lost markets, without the prospect of obtaining anywhere substituted markets, but the consequences of the War have made themselves felt in other ways not less disastrous, and at the present moment apparently not less hopeless. The effect upon the currencies of the world, the debasement of the pre-war currency which has been occasioned by the unlimited extension of paper money, has produced consequences, very familiar to all of you, upon the exchanges of the world; and, it is hardly too much to say, have established a state of conditions, a flux, in the whole business

XIX. world which is not only disturbing at the moment to any extension of enterprise, but threatens for a period, to which the most acute business mind can assign no limits, to prevent any restoration at all of the old pre-war spirit of confidence and of enterprise. Be it observed that the problem of the exchanges, which has forced itself upon the attention of the business world in so crude a form in the period which has elapsed since the Armistice, is one which in its existing intensity is almost a new one. None of the previous struggles of the last few centuries in the modern world has presented us with business perplexities on anything like so large a scale, springing directly from problems of exchange. It is quite true that, if you go back far enough, to the great struggles between some of the Greek City States, you do discover a general dislocation and even paralysis of exchange, which present us with problems very comparable to those under which the world is suffering to-day, and perhaps not wholly without the prospect of affording some slight degree of economic guidance. But, believe me, the problem is not one which can be disposed of by the superficial view on the part of any one nation that, inasmuch as exchange at the moment favours them, inasmuch, in other words, as they can buy commodities at an unexpectedly low rate in another country, therefore the resultant financial situation must be pronounced to be one which is advantageous to themselves. This, indeed, would be a very elementary and a very inadequate view. The real truth is that no accidental, artificial, and transient advantage that

is to be gained in this way, presenting no reality of commercial health but only a hectic feverish imitation of health, can for any sustained period benefit any nation. What is wanted is not the occasional advantage which is presented by a favourable exchange but the restoration, for the whole world, as much for the wealthiest as for the poorest communities, of stable conditions, the encouragement of confidence, the inducement to capital to take risks—because capitalists feel that the moment has come when there is sufficient promise of security and of permanence in the commercial situation to make it prudent on their part to take risks. No view could be more superficial than that which from time to time is taken in this or some other countries in the world depending upon a censure of the capitalist. The capitalist is not, never has been, and I most sincerely trust never will be, a philanthropist. It would, believe me, be a very bad thing for any individual country in which the commercial community were suddenly to abandon business methods in the application of their capital, and substitute for those methods the somewhat vague influence of benevolence. There the task of benevolence, though a very necessary one, may properly be left to other channels, because you will only involve yourself in misfortune and disaster, if that, which ought to be governed and must be governed by purely economic and commercial considerations, is diverted into channels which are wholly irrelevant to it. In other words, the question, the one question, which the custodian of capital has to consider, is: What

XIX. are the conditions which, in the interests of capital taken as a whole or of the particular capitalist who is applying his mind to the problem, present themselves as a field for enterprise? The moment he allows his mind to be influenced or deflected by other considerations, he is endangering the whole system upon which capital depends, and, in endangering that system he is, in my judgment, endangering the very cause of civilisation itself, which is bound up with the stability and with the maintenance of the capitalist's existence.

I hope I have said enough to make plain my view that we are to approach the problems—towards which it seems to me you may make so powerful a contribution—with our minds unaffected by the prejudices and the passions of the last few years. We are to approach them, in other words, with the feeling that a certain special duty is imposed upon the business men of the world. It is imposed upon them because, quite obviously, they can give a guidance upon these points which no other class in the world can give. After all, if you are dealing with medical matters, as a rule it is found to be more convenient to go to a doctor. If you are dealing with scientific matters, you probably would not choose a butcher for the purpose of giving advice. Our experience, and the teaching of common sense, have habituated us to asking for and obtaining advice from specialists. There never was any pursuit known to me which was more specialised in its character, more specialised in the laborious attainment of the experience which

alone leads to efficiency, than the occupation of business men, and I therefore say that, while there may be other problems—moral problems, political problems, social problems, on which the experience of business men is not necessarily specially helpful, unless they are also, as they may well be, citizens of versatile common sense and experience—there are these problems on which business men can and must give guidance which nobody else can give. XIX.

Let me tell you almost in a few sentences what I conceive to be the general nature of those problems. I start in the first place by stating a commonplace. I say there will be no prosperity, there will be no contentment, there will be no order and there will be no harmony, in this life which we have to build up from the shipwreck of the War, until the maximum trade which can be attained in existing or future conditions is created in the world—until, in other words, there is the maximum production in the world which the actual economic conditions render possible, and until there is the maximum facility for the transportation and the distribution of these commodities, when produced, from him who would sell to him who would purchase. And I say, in the third place, that the necessary healthy state of trade cannot be restored, unless, with the least possible delay, the feverish changes which take place from day to day and from week to week, in the exchanges of the world are readjusted or modified so that the non-purchasing class may be prevented from increasing. Enormous masses of population have already, for

XIX. other reasons, ceased to be possible purchasers. To these are being added those great communities which would gladly purchase from you if they could, but cannot purchase from you, though they would, simply because the relative position of the exchange prevents them. That which they possess and which is in itself a valuable commodity, namely, the capacity of their labour, is paralysed and rendered unmarketable by conditions of exchange which I hope I have already convinced you must, if the world is to regain commercial sanity and financial stability, undergo curative treatment.

I am bold enough to suppose—and certainly the Government of which I am a member confidently believes—that it is in your power to render service in the directions which I have indicated that no other body of men can render. For the reasons I have attempted to make plain you ought to apply your minds to those problems in a cool and completely passionless mood. It may be the business of other people to consider the wrongs which preceded the War, the wrongs that accompanied the War, the animosities which have survived and some of which no doubt for a long time will continue to survive the War. But such pre-occupations, natural and inevitable as they may be, do not seem to me to be specially your pre-occupations, and your recommendations ought, in my judgment, to be entirely divorced from the moods to which I have made reference. If your recommendations are of a kind which are in acute antagonism with that which is believed by the Governments of the respective

countries to be politically necessary, you can at least be told so, but I do not think it is for you to put forward or indeed to give weight to anything which is founded upon considerations which are not purely business in their content. For this reason I for one greatly welcome the indication given by your Chairman that, numerous as the nations are which at the present moment are represented at this Conference, it is intended shortly to add still further to their number. I cannot conceive that in the present situation of the world anything is to be gained by the ostracism from these discussions of any nation—*any* nation. Such an ostracism could only be defended if your point of view was that the business community in all the world would be benefited by the permanent exclusion or the exclusion for a very long period of a late enemy from the business of the world. But quite obviously that is not the view which has been taken by the statesmen who are responsible for the Treaty of Versailles. If that had been their view it would of course have been quite impossible for them to have imposed upon Germany the obligation to pay large indemnities. Large indemnities, as you gentlemen very well know, are not in any existing circumstances or in any circumstances that are likely to occur, to be expected in gold, and nobody desires that they should receive in payment of these indemnities any additional product of the printing presses of the Central Powers. If indemnities, therefore, are not payable in gold and are not desired in paper, it would appear necessarily to follow

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XIX. that they can only be rendered either in labour directly, or indirectly by the returns of labour, and the moment one reaches a conclusion upon an analysis which, after all, is both simple and elementary, it follows that those who have imposed upon Germany indemnities and reparations, and who intend to exact them, must equally prepare themselves to render easy a transition under which it will be possible for those reparations to be paid, simply in order that the labour may not be sterilised which and which alone will make the payment of such reparations conceivable. Therefore I very much hope that your recommendations as and when they are made will result from your having looked at the civilised world as a whole. Apply your minds to comparing the conditions of all those countries in the world which either actually at this moment are markets or, by the exercise of what I would call commercial statecraft, can be converted into markets; in other words, markets which are either actual or potential. I for one entertain not the slightest doubt as to the beneficent result of your labours in this direction, and indeed I go further and say that no other body of men in the world can discharge exactly the function which it is in your power to discharge.

I know well and you know well the hopes that have been entertained of the services that in this connection might be rendered by the League of Nations. I shall naturally avoid, upon a highly disputable and delicate question, saying a single word which could be misunderstood by the representatives here of any nation, and I will

therefore only add this, that, while I and many of us notice with sincere respect the efforts which have been made by the League of Nations, in circumstances of very great difficulty, we recognise that they cannot possess the full advantage which this Association already possesses and will continue to possess, that amongst its representatives are those who speak on behalf of all the great countries in the world. I do not of course say a single word as to the historical reasons which have prevented the participation of the United States of America in the work of the League of Nations. It was for them and for them alone, it was their undoubted right, and they have exercised their undoubted right, to take their own decision as to the course which they would pursue. I refer to the subject for one reason and one reason only, and that is to congratulate ourselves that the reasons which were found in the actual political circumstances to prevent the participation of the United States of America, for the moment at least, in the work of the League of Nations have not been sufficient to prevent their participation in the vital labours which lie in front of this Conference.

We therefore approach the consideration of the great questions which I have imperfectly summarised to you with the enormous advantage of having represented amongst us some of the foremost and most experienced commercial men in the United States of America. I have made it my business to read some of the speeches which have been made, either at Atlantic City or at Paris, by those who spoke on behalf of

XIX. the United States. I observed with the greatest possible pleasure the insight and the intuition which led them most clearly to the conclusion that, whatever may be the political goal at which the great Republic, through the efforts of its statesmen, is likely to aim, at any rate as far as the world of business is concerned, not even the Monroe Doctrine can prevent the realisation of the great truth that the world is one and indivisible, and the United States of America, not only geographically but by every material standard by which we measure the greatness of nations, is part of the world, and must remain a very considerable part of the world.

Therefore without running the risk that any of our guests will think I am being too particular in the mention that I make of the American share in this new enterprise, I say that we, the Government, are well aware of the part which the great American Republic is so specially qualified to play; that we welcome their representatives amongst us and are confident that the exchange of so much experience operating upon so much goodwill will afford to us the most rapid relief of our sufferings which the extent of our difficulties renders possible. Let no one think that we shall escape them in a month or in a year or in two years, but if no effort of this kind is made it might easily happen that a generation or more than a generation would pass before we even saw the beginnings of a new dawn. I am one of those who believe that if we are more fortunate than we have been in our solution of our industrial difficulties, if we can imitate the greater elasticity

which has been exhibited by some countries in the world, and if we apply ourselves scientifically with goodwill, harnessing to the purpose all the resources of civilisation, and not merely working discordantly as separate countries, we may attain a solution earlier than some have even believed to be possible. XIX.

In conclusion, in offering you this welcome to-day on behalf of the Government I will only say that anything we can do as a Government will be most readily done in assisting you in your deliberations, and we will give you any official convenience which may render these enquiries easier to you.

When your Chairman points out that I have given some undertaking in reference to the codification of commercial law, he is, I think, a little too sanguine. To avoid misconception, I must make plain what the position is. So far as I know, I have entered into no undertaking of any kind upon that matter. Much progress in this country has been already made in the direction of codification of commercial law, and I do not doubt that it will be possible, even in the near future, to make further progress upon the same lines; I have not made up my mind in any detail as to how far that process may usefully be extended at this moment—indeed, I shall look for advice to this Association, advice founded, I hope, on the harmonious recommendations of the commercial men of many countries. I give you the most definite assurance, upon the part of the Department of the Government which falls more exclusively to myself than to

XIX. any one else, that any recommendation made by this Association which aims at producing greater simplicity in the legal enactments of this country, with the object of bringing them either in substance or in form into more convenient harmony with the legal arrangements of other countries, will be most attentively and swiftly considered by me; and if I am convinced, as I should expect to be convinced if there was agreement amongst all you gentlemen, of the desirability of that which was recommended, I should certainly be willing to make legislative proposals in Parliament in this country, and I have no doubt that, fortified by such authority, the prospects of such proposals would be good. I shall, I hope, be excused for making more plain than I have tried to do, that I regard it as a privilege to have been asked here to-day. I am most unfortunately—and no one regrets it as I do—unable to allow myself the pleasure of hearing the later speeches, because in the pressure of labour under which our lives are lived to-day I have an imperative engagement which takes me elsewhere almost immediately.

Give me leave, Sir, to say, as I do in the most hearty and unreserved way, that on behalf of all my colleagues I welcome you here to-day, and we sincerely hope that your deliberations will be fruitful in their results. We assure you of our desire not to be lacking in anything which can add either to your comfort as you deliberate or to your help in those deliberations. It is for you to apply great and unprejudiced minds to great and immeasurable distress.

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THE END

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